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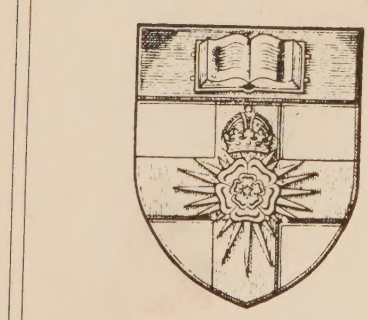

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CONTAINING

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IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

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Lord Chancellor.

The Right Hon. Ignatius John O'Brien.

Lords Justices of Appeal.

The Right Hon. Hugh Holmes.

The Right Hon. Richard R. Cherry.

The Right Hon. John F. Moriarty.

Chancery Division.

The Right Hon. Charles A. O'Connor, M.R.

The Hon. Dunbar Plunket Barton.

Land Judge.

The Right Hon. John Ross.

Irish Land Commission: Judicial Commissioners.

The Right Hon. J. O. Wylie.

The Hon. Gerald FitzGerald.

Attorneys-General.

The Right Hon. John Francis Moriarty.

The Right Hon. Jonathan Pim.

Solicitors-General.

Jonathan Pim, K.C.

James O'Connor, K.C.

[These Reports will be cited as follows :—[1914] 1 I. R.]

REPORTERS.

Court of Appeal, . .	R. St. J. Chadwick, James Moles,	Barristers-at-law.
Master of the Rolls, .	William Lawson, A. H. Webb,	Barristers-at-law.
Mr. Justice Barton, .	R. W. Lucas, E. C. Farran,	Barristers-at-law.
Land Judge, ...	D. M. Steen.	Barrister-at-law.
Land Commission, .	John Edwd. Walsh,	Barrister-at-law.

CORRIGENDA.

Page 119, line 8, *delete* " K.C."
,, 172, ,, 16, *for* reference number " (2) " *read* " (1)."
,, 177, end of last line, *for* " sub-s. 11," *read* " sub-s. 1."
,, 215, foot-note, *for* "[1914] 1 I. R. 113, 118," *read* "[1914] 2 I. R. 15."

MEMORANDA.

In the Hilary Sittings, 1914, the Rt. Hon. Richard Robert Cherry was appointed Lord Chief Justice of Ireland in the room of the Rt. Hon. Lord O'Brien, resigned.

In the Trinity Sittings, 1914, the Rt. Hon. John Francis Moriarty, His Majesty's Attorney-General for Ireland, was appointed a Judge of His Majesty's Court of Appeal in Ireland.

Jonathan Pim, Esq., K.C., His Majesty's Solicitor-General for Ireland, was appointed Attorney-General; and

James O'Connor, Esq., K.C., was appointed His Majesty's Solicitor-General for Ireland.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Ambrose's Estate, *In re*, 123
Archer's Estate, *In re*, 285
Ardagh's Estate, *In re*, 5
Attorney-General *v.* Howley, 124
Attorney - General, Concannon *v.*; *In re* Lavelle, 194

B.

Bell *v.* Park, 158
Beresford's Settlement, *In re*; Irvine *v.* Beresford, 222
Blackburne's Estate, *In re*, 1
Borrisokane Rural District Council, *In re*; *Ex parte* Higginbotham, 297
Burke, *In re*; Wood *v.* Taylor, 81
Byrne, Smyth *v.* 53

C.

Carysfort's (Earl of) Estate, *In re*, 96, 101
Cheator, Fennelly *v.*; *In re* Green, 305
Chute's Estate, *In re*, 180
Colohan *v.* Condrin; *In re* Condrin, 89
Commissioners of Mountjoy Square *v.* Morrin, 43
——— *v.* Walsh 50, *note*
Concannon *v.* Attorney-General; *In re* Lavelle, 194
Condrin, *In re*; Colohan *v.* Condrin, 89
Condon *v.* Mitchelstown Rural District Council, 113, 118
Cork Rural District Council, O'Shea *v.* 16
Cootehill (No. 2) Rural District Council, Marron *v.* 201, 08
Cronin, *In re*, 23
Cullen, Reilly *v.* 60
———, Tuite *v.* 60

D.

Doherty, Dublin City Distillery, Limited, *v.* 389
Dublin City Distillery, Limited *v.* Doherty, 389

E.

Ellard *v.* Phelan, 76

F.

PAGE
Fennelly *v.* Cheator; *In re* Greene, 305
Fetherstonhaugh, Sheane *v.* 268
Fortescue *v.* M'Keown, 30, 32

G.

Gannon, *In re*; Spence *v.* Martin, 86
Grand Canal Boatmen and Workmen's Benefit Society Funds, *In re*; Tierney *v.* Tough, 142
Grant's Estate (No. 2) *In re*, 364
Greene, *In re*; Fennelly *v.* Cheator, 305
Greene *v.* Irish Land Commission, 175

H.

Higginbotham, *Ex parte*; *In re* Borrisokane Rural District Council, 297
Howley, Attorney-General *v.* 124
Hutchinson's Trusts, *In re*, 271

I.

Inchiquin's (Lord) Estate, *In re*, 248
Irish Land Commission, Greene *v.* 175
Irish Polishes, Limited, Windschuegl *v.* 33
Irvine *v.* Beresford; *In re* Beresford's Settlement, 222

J.

Jones's Estate, *In re*, 188

L.

PAGE
Lavelle, *In re*; Concannon *v.* Attorney-General, 194
Lecky *v.* Walter, 378
Lee (Edward) and Co., Ltd. *v.* National Telephone Company, Ltd., 9
Lefanu *v.* Richardson, 321, 344
Leigh-White *v.* Ruttledge, 135
Limerick (No. 1) Rural District Council, *In re*, 65
Locke's Estate, *In re*, 302

M.

McCaughey *v.* Stringer and Mahaffy, 73
McKeown, Fortescue *v.* 30
Marron *v.* Cootehill (No. 2) Rural District Council, 201, 208
Martin, Spence *v.*, *In re* Gannon, 86
Midleton (Viscount), Landlord; Wallis, Tenant, 35
Mitchelstown Rural District Council, Condon *v.* 113, 118
Morrin, Commissioners of Mountjoy Square *v.* 43
Mountjoy Square (Commissioners of) *v.* Morrin, 43
Mountjoy Square (Commissioners of) *v.* Walsh, 50, note

N.

Nash's Estate, *In re*, 290
National Telephone Company, Limited, Lee & Co., Limited, *v.* 9
National Telephone Company Limited, Stevens *v.* 9

O.

	PAGE
O'Shea *v.* Cork Rural District Council,	16

P.

Park, Bell *v.*	158
Phelan, Ellard *v.*	76

R.

Reilly *v.* Cullen,	60
Richardson, Lefanu *v.*	321, 344
Royal Warrant Holders' Association *v.* Sullivan,	236
Ruttledge, Leigh-White *v.*	135

S.

Shaw *v.* Shaw; *In re* Taylor,	111
Sheane *v.* Fetherstonhaugh,	268
Smyth *v.* Byrne,	53
Spence *v.* Martin; *In re* Gannon,	86
Stevens *v.* National Telephone Company, Limited,	9
Stringer and Mahaffy, McCaughey *v.*	73
Sullivan, Royal Warrant Holders' Association *v.*	236

T.

Taylor, *In re*; Shaw *v.* Shaw,	111
Taylor, Wood *v.*; *In re* Burke,	81
Tierney *v.* Tough; *In re* Trusts of Grand Canal Boatmen and Workmen's Benefit Society Funds,	142
Tough, Tierney *v.*; *In re* Trusts of Grand Canal Boatmen and Workmen's Benefit Society Funds,	142
Tuite *v.* Cullen,	60

W.

Wallis, Tenant; Midleton (Viscount), Landlord,	35
Walsh, Commissioners of Mountjoy Square *v.*	50, note
Walter, Lecky *v.*	378
Windschuegl *v.* Irish Polishes, Limited,	33
Wood *v.* Taylor; *In re* Burke,	81

TABLE OF CASES CITED.

A.

PAGE

Abbott's Trusts, . . . 149
Adam *v.* Newbigging, . . 384
Andrew's Trust, *In re*, . 148, 149
Arnold *v.* Dixon, . . . 269
Attorney-General (Annally) *v.* Ballymahon Union (Guardians of), ... 18
——— *v.* Bunce, 278, 280
——— *v.* Drummond, 275, 276, 277, 278, 279
——— (Humphreys) *v.* Erasmus Smith's Schools (Governors of), . . . 18
——— *v.* Fetherstonhaugh, . . 126, 130
——— (Spalding Rural District Council) *v.* Garner, ... 20
——— *v.* Goulding, 311
——— *v.* Harley, . 163
——— *v.* Howley, 177, 178
——— *v.* Hutton, 276, 278, 279
——— *v.* Leonard . 178
——— *v.* Merthyr Tydfil Union (Guardians of), 19
——— *v.* Pearson, . 278
——— (Rhondda Urban District Council) *v.* Pontypridd Waterworks Co. 19
——— *v.* Ruper, . 306
——— *v.* Sidney Sussex College, 195, 196, 197, 198
Averall *v.* Wade, . . 183, 288
Ayscough *v.* Bullar, . . 19

B.

Bailey *v.* Bailey, . . . 51
Bainbridge *v.* Bainbridge, . 82
Baker *v.* Billericay Guardians, 301
Balfe *v.* Lord, ... 26
Baltimore Railway Co., *In re*; *Ex parte* Daly, . . . 299
Barcroft *v.* Murphy, . . 126
Barker *v.* Purvis, . . . 74
Barnes *v.* Racster, . . 286, 287
——— *v.* Shore, . . . 282
Barnett *v.* Eastman, . . 83, 85
Bayley's Settlement, *In re*, . 228
Belfast Water Commissioners, *In re*; *Ex parte* Dalway, 299, 300
Bell *v.* Belfast Corporation, . 300
Bibbie *v.* Lumley, . . . 191
Birch *v.* Joy, ... 299
Biss, *In re*; Biss *v.* Biss, . . 56, 57
Borrowes' Estate (No. 2), *In re*, 258, 259
Boyce *v.* Paddington Borough Council, ... 19, 21
Bradshaw *v.* Jackman, . . 78
Braithwaite *v.* Attorney-General, 148, 149, 150
Braund *v.* Earl of Devon, . 196
Brennan *v.* Moran, . . . 164
Brownlie *v.* Campbell, . 384, 385
Bryan's Estate, ... 163
Buck, *In re*, ... 147
Bugden *v.* Begnold, . . 286, 287
Burgess *v.* Booth, . . . 269
Burke *v.* Power, . . . 79

C.

Carbery *v.* Cox, 78, 307, 311, 312, 313, 314, 315, 316
Carr *v.* Griffith, . . . 83
Carroll's Estate, *In re*, 190, 192, 193
Carter *v.* Carter, . . 139, 140
Chadwick *v.* Doleman, . . 228

PAGE
Chessum & Sons *v.* Gordon, . 74
Churchill, *In re*, . . . 178
City Discount Co. *v.* McLean, . 183
Clayton's Case, 182, 183, 185, 186
Close's Estate, *In re*, . . 103
Coles *v.* Coles, . . 139, 141
Collen Bros. *v.* Dublin County Council, ... 300
Collingwood *v.* Stanhope, . 228, 234
Colyer *v.* Finch, . . . 288
Condon *v.* Mitchelstown Rural District Council, 202, 207, 208, 209, 210, 211, 212, 213, 214, 216, 217, 220
Cook *v.* Cook, ... 31
Cooper *v.* Pearse, . . . 10
Coote *v.* Boyd, . . . 163
Cowley *v.* Newmarket Local Board, ... 209
Craigdallie *v.* Aikman, . . 278
Cresswell *v.* Cresswell, . 162, 174
Cunnack *v.* Edwards, 148, 149, 150, 153, 154, 155, 156
Currie *v.* Goold, . . . 191
Cussen *v.* Hynes, . 78, 80, 307, 319

D.

Dalway, *Ex parte, In re* Belfast Water Commissioners, 299, 300
Daly, *Ex parte*; *In re* Baltimore Railway Co., . . . 299
Daniell *v.* Sinclair, . . . 193
Deeley *v.* Lloyd's Bank, . . 183
Delaney's Estate, *In re*, . . 79
Dempsey *v.* Ward, . . . 57
Dickinson *v.* Dilwyn, . . 140
Dill *v.* Watson, . . . 278
Dodson, *In re*, ... 269
Drummond *v.* Attorney-General, 275, 279
Dublin, Wicklow, & Wexford Railway Co., *In re*; *Ex parte* Jordan, ... 299
Duncombe *v.* Duke of Leinster, 227
Dunlewey Benefice Case, . . 345
Dyer *v.* Dyer, ... 92

E.

Edwards, *In re*, . . . 140
Ellis's Settlement, *In re*, 139, 141
Eykyn's Trusts, . 91, 92, 93, 95

F.

PAGE
Farrell *v.* Maher, . . 56, 57, 59
Farrington *v.* Forrester, *In re* Jones, ... 288
Fauntleroy *v.* Beebe, . 269, 270
Fenton *v.* Walsh, . . . 26
Fischer's Estate, *In re*, 97, 99, 101, 102, 104, 105, 110
Fisher, *In re*, . . . 251, 254
Fitzgerald *v.* Champneys, 338, 354
Flint *v.* Howard, . . 287, 289
Foley *v.* Wontner, . . . 278
Foster *v.* Great Western Railway Co., *In re*, . . . 253
Free Church of Scotland *v.* Overtoun, ... 278
Freeland *v.* Neale, . . . 282
Fritz *v.* Hobson, . . . 74

G.

Gibbon *v.* Payne, . . 37, 38, 42
Gibson *v.* Doeg, . . . 38
Gilbert *v.* Tomison, . . . 10
Gompertz *v.* Bartlett, . . 3 8
Goulder *v.* Camm, . . 112
Graham *v.* Commissioners of Works, ... 126
Grant's Estate, *In re*, . 365, 368, 370
Gurney *v.* Wormersley, . 388

H.

Hardacre *v.* Nash, . . 79
Harding *v.* Metropolitan Railway Co., ... 299
Hearn *v.* Donellan, . 317, 318, 320
Heilbut, Symons, & Co. *v.* Buckleton, ... 384
Heming *v.* Clutterbuck, 162, 166, 171, 172
Hemming *v.* Griffith, . . 227
Herbert *v.* Herbert, . 269, 270
Herbert *v.* Purchas, . . 337
Hewley's (Lady) Case; Shore *v.* Wilson, . . 278, 280, 281
Hill's Trusts, *In re*, . . 7
Hoare, *v.* Osborne, . . 306
Hooley *v.* Hatton, 161, 162, 163, 166
Hopkinson *v.* Rolt, . 182, 185
Hornsey District Council *v.* Smith, ... 51
Howard *v.* Earl of Shrewsbury, 57
Hughes *v.* Williams, . . 288
Hunter *v.* Attorney-General, . 78
Hutchings to Burt, *In re*, . 112
Hyett *v.* Mekin, . . . 269

I.

PAGE
Irish Land Commission *v.* Grant, 177
——————— *v.* Ryan, 126
Irish Society *v.* Fleming, 19

J.

Jackson *v.* Jackson, 162
Jacob *v.* Down, 38
Jennings *v.* Broughton, 384
Johnson *v.* Bright-Smith, 308
Johnston *v.* Moore, 26
Jones, *In re*; Farrington *v.* Forrester, 288
Jones *v.* Ogle, 82
Jordon, *Ex parte*; *In re* Dublin, Wicklow, and Wexford Railway Co., 299

K.

Keech *v.* Sandford, 57
Kehoe *v.* Wilson, 307, 315, 317
Kennedy *v.* Panama, New Zealand, and Australian Mail Co., 384, 386, 387
Ker *v.* Ker, 183, 187
Kidd *v.* North, 162
King *v.* Lord Ardilaun, 47, 49
Kingan *v.* Matier, 138, 139, 141
Kingdon *v.* Bridges, 92
Kirkwood's Estate, *In re*, 100

L.

Lamplugh *v.* Lamplugh, 92
Lead Company's Workmen's Fund Society, *In re*, 148
Leader's Estate, *In re*, 371
Leader *v.* Duffy, 233
Leconfield's Estate, *In re*, 253, 254, 258
Lee *v.* Pain, 164
Leslie's Hassop Estates, *In re*, 6, 8
Liston *v.* Keegan, 307, 315, 316
Lloyd *v.* Pughe, 93
Lysaght *v.* Lysaght, 83

M.

M'Carthy *v.* Bennett, 294
M'Carthy *v.* Daunt, 126
M'Carthy *v.* M'Cartie, 183
M'Connell, *In re*, 51, 52
M'Donnell *v.* M'Mahon, 61
M'Kenna *v.* Howth, 38

PAGE
M'Naghten *v.* Boyd, 87
Maguire and M'Clelland's Contract, 57
Marron *v.* Cootehill Rural District Council, 18
Marshall *v.* Crutwell, 91, 93
Maunsell's Estate, *In re*, 304, 305
Mayne *v.* Woodward, 164
Mercer's Company, *Ex parte*, 251
Metford, *In re*, 253
Metropolitan Coal Consumers' Association, Karberg's Case, 384
Midland Railway Company *v.* Edmonton Union, 300
Mill's Estate, *In re*, 251, 253, 254
Moggridge *v.* Thackwell, 163
Morrough *v.* Lord Dufferin, 87
Morton's Trusts, 228
Mountjoy square (Commissioners of) *v.* Walsh, 46, 47, 49
Murphy's Estate, *In re*, 103
Murphy *v.* Cheevers, 318
——— *v.* Hynes, 319
——— *v.* Lyons, 46
——— *v.* Soady, 125, 133
Mutton *v.* Peat, 183
Mutual Life Assurance Society *v.* Langley, 288, 289

O.

Ocean Accident Co. *v.* Collum, 183
O'Hanlon *v.* Logue, 79, 306
Oppenheimer *v.* Boatman, 83
Owen's Estate, *In re*, 270

P.

Page *v.* Midland Railway Co., 183, 187
Parker *v.* Dunn, 34
Parkinson, *In re*, 68, 69, 71
Passmore *v.* Oswaldthistlethwaite Urban Council, 51
Paul's Estate, *In re*, 98, 100, 101, 102, 109, 110
Pentland *v.* Stokes, 126
Pery *v.* Farley, 38
Piercy, *In re*, 7
Plumptre's Settlement, *In re*, 139, 141
Printers' and Transferrers' Amalgamated Trades Protection Society, 148, 154, 155, 157

Q.

Quinton *v.* Frith, 57

R.

PAGE
R. (Ryan) *v.* Cork (Recorder of), 116, 202, 208, 210
— (Clanricarde) *v.* Estates Commissioners, . . . 372, 373
— (Hinds) *v.* Estates Commissioners, ... 373
— *v.* Irish Land Commission ([1894] 2. I.R. 394), . . 177
— (Gosford) *v.* Irish Land Commission, ... 177
— (Eustace) *v.* Local Government Board, ... 69
— (Ferguson) *v.* Lurgan Rural District Council, 116, 117, 119, 202, 203, 209
— *v.* M'Cann, . . . 125
— *v.* Manchester (Mayor of), . 46
— (Monaghan County Council) *v.* Monaghan Urban District Council, ... 300
— *v.* Salisbury, ... 327
— *v.* Wrangham, . . . 178
Rawlins *v.* Wickham, . . 384
Rea *v.* Rawlinson, . . . 87
Redgrave *v.* Hurd, . . . 384
Reeves *v.* Penrose, . . . 210
Rhys *v.* Dare Valley Railway Co., ... 299
Richardson *v.* Greese, . . 79
Robinson, *In re*, . . . 194
Rocella's Estate, *In re*, . 190, 192
Roche's Estate, *In re*, 183, 288, 289
Roche *v.* M'Dermot, 317, 318, 320
Roddy's Estate, *In re*, . . 288
Royal Warrant Holders' Association *v.* Edward Deane and Beale, Ltd., . . 244, 246
——— ——— *v.* Slade & Co. . 245
Rumboll *v.* Rumboll, . . 92
Russell *v.* Dickson, . . 164

S.

St. Albans (Duke of) *v.* Beauclerk, ... 163, 164
Salusbury *v.* Denton, . . 79
Schmarr, *In re*, . . 251, 254
Scholfield *v.* Spooner, . . 139
Scott's Estate, *In re*, . . 288
Scottish Widows Fund *v.* Craig, 46, 47, 51, 52
Seddon *v.* North Eastern Salt Co., ... 384, 386
Severn and Wye and Severn Bridge Railway Co., *In re*, . 84
PAGE
Sharpington *v.* Fulham Guardians, ... 300
Sherry, *In re*, . . . 185
Shields *v.* Shields, . . . 26
Shore *v.* Wilson (Lady Hewley's Case), ...278, 280, 281
Sidney's Estate, *In re*, . . 51, 52
Sims *v.* Quinlan, 306, 313, 315, 316
Smith, *In re*, Johnson *v.* Bright-Smith, ... 308
South *v.* Bloxham, . . 287, 288
Spencer *v.* All Souls' College, 196, 197
Steed *v.* Preece, . . . 269
Steedman *v.* Poole, . . 112, 113
Stenhouse *v.* Mitchell, . . 82
Stewart *v.* Green, . . . 78, 79
Stinson's Estate, *In re*, 269, 270, 271
Studham *v.* Stanbridge, . . 61
Suisse *v.* Lowther, . . . 164
Swanton's Estate, *In re*, . . 270

T.

Templemoyle Agricultural School, *In re*, ... 196
Tennent *v.* Neil, . . 37, 38, 42
Teulon *v.* Curtis, . . . 26
Tevlin *v.* Lisnaskea Rural District Council, 19, 21, 117, 119, 202, 207, 209, 210, 214, 215, 217, 220
Theobald *v.* White, . . 83
Tighe *v.* Dolphin, . . 183, 288
Torrance *v.* Bolton, . . . 384
Tottenham Local Board *v.* Rowell, 46, 47, 51
Townsend *v.* Moore, . 161, 163
Travers *v.* O'Donoghue, . . 79
Treacy *v.* Corcoran, . . . 83
Tuckey *v.* Henderson, . 162, 174

U.

Underhill *v.* Ellicombe, . . 51

V.

Vallance *v.* Falle, . . . 51

W.

Walsh *v.* Walsh, . . . 78
Walter's Estate, *In re*, . . 252

	PAGE
Warberton's Estate, *In re*, .	299
Weale *v.* West Middlesex Water Co., ...	51
Webb *v.* Derbyshire, . .	82, 85
——— *v.* Stenton, . . .	83
Weir *v.* Fermanagh County Council, . . .	18, 19, 20
West *v.* Downman, . .	51
West Ham Corporation *v.* Sharp, ...	48, 51
West London Commercial Bank, *In re*, ...	178
Wheeler *v.* Commissioners of Public Works,	125, 126, 130, 133
Wilde *v.* Gibson, . .	384, 385
Wilkinson's Trusts, *In re*,	79, 308
Williams *v.* Pinckney, . .	228
Wilson *v.* O'Leary,	162, 163, 166, 172
Windham *v.* Graham, .	227, 228
Wise's Settlement, *In re*,	227, 228
Wrottesly's Settlement; Wrottesly *v.* Fowler, . .	234

CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1914.

IN THE MATTER OF THE ESTATE OF F. W. BLACKBURNE.

Wylie, J.
1913.
Nov. 17.

Land Purchase Acts—Impropriate tithe rentcharge—Redemption—Value—Element of variation—Tithe Rentcharge (Ireland) Act, 1900 (63 & 64 *Vict. c.* 58), *ss.* 2 *and* 3.

On an application to redeem and fix the redemption-price of an impropriate tithe rentcharge of £8 9*s.* 4*d.* payable out of lands situated in Co. Meath, and secured on a second-term rental of £304, where it appeared from the tables compiled from the appendices to the reports annually published by the Land Commission that the percentage of variation in Co. Meath of judicial rents payable during a second or subsequent statutory term, as compared with judicial rents payable during the last preceding statutory term, for the thirteen years subsequent to the passing of the Tithe Rentcharge (Ireland) Act, 1900, was 12·6 per cent., and on the assumption that at the end of the statutory period of fifteen years the percentage of variation would be in or about 12 per cent., the redemption-price was fixed at £190, on the basis of a well-secured rentcharge of £8 9*s.* 4*d.*, payable for two years, and then of £7 9*s.*, payable in perpetuity.

Wylie, J. 1913. *In re* BLACKBURNE'S ESTATE

APPLICATION by the vendor to redeem and fix the redemption-price of an impropriate tithe rentcharge of £8 9*s.* 4*d.*, payable to John Prys-Eyton out of the lands of Tootstown South, situate in the Parish of Syddan, Barony of Lower Shane, and county of Meath, which had been sold in this matter under the Land Purchase Acts.

At the time of sale the lands were in the occupation of one tenant at a second-term judicial rent of £304. It appeared that the percentage of variation in accordance with the provisions of section 2 (1) of the Tithe Rentcharge (Ir.) Act, 1900, for county Meath was 19·7 per cent., and that the percentage of variation for the thirteen years that had elapsed since the passing of that Act, according to the tables compiled from the appendices to the Reports annually published by the Land Commission, was 12·6 per cent.

E. FitzGerald for the vendor:—

At the last revision, tithe rentcharge payable out of the Parish of Syddan was reduced by 19·7 per cent. The tithe rentcharge of £8 9*s.* 4*d.* should be redeemed at a rate of years' purchase bearing in mind that it would be subject in the ordinary course to a further reduction of a substantial amount in two years' time.

W. M. Jellett, K.C., for John Prys-Eyton:—

The security for this tithe rentcharge is unquestionable. No doubt the tithe rentcharge would be subject to variation in two years' time. The amount of that variation would depend on the percentage of variation of judicial rents in county Meath as certified by the Land Commission, pursuant to the provisions of sect. 2, sub-sect. 2, of the Act of 1900. In preparing that certificate in accordance with the terms of the sub-section, the Land Commission are bound to take into account not only judicial rents which have been actually fixed for a second term, but also first-term judicial rents which have not been fixed for a second term. The tables showing the percentage of

variation for the last thirteen years do not take the latter into account. If this is done, the percentage of variation would necessarily be less.

WYLIE, J.:—

It is clear that the only way to deal with this matter is to have regard to the facts as they exist, and to the law applicable to those facts as it exists. It is plain that there must be a reduction in tithe rentcharge, payable out of lands in county Meath, of in or about 12 per cent. in two years' time. I refer to the provisions of sections 2 and 3 of the Act of 1900, and to the appendices to the Reports referred to in the former section. With regard to Mr. Jellett's point, the tables showing the percentage of variation during the last thirteen years are compiled from the appendices to those Reports, which were published annually by the Land Commission for nearly twenty years before the Act of 1900 was passed. Those appendices do not deal with the cases of tenants who have not come in to have judicial rents fixed for a second term, for the obvious reason that no materials exist for dealing with such cases; and by the Act the Land Commission certificate must be based on those tables alone. Now, according to these tables, the percentage of variation for county Meath during the last thirteen years is 12·6 per cent. There are two more years still to run before the variation takes place. At the end of the statutory period of fifteen years, the percentage of variation for the county will probably be in or about 12 per cent. This would mean that the tithe rentcharge would be reduced to £7 9*s.* I think that the possibility of a further reduction for a third or any subsequent period may be treated as practically nil, and that the £7 9*s.* may be regarded as equivalent to a tithe rentcharge payable without variation in perpetuity. The security for its payment is undoubtedly first class. Accordingly, I will treat this tithe rentcharge as one of £8 9*s.* 4*d.* payable for two years, and of £7 9*s.* payable in perpetuity, and fix the redemption-price at £190, or twenty-five and a half years' purchase of the latter sum.

I may add that in this case I am dealing with county Meath. Every other county will have to be dealt with on its own state

Wylie, J. 1913.

In re Blackburne's Estate.

of facts. The percentage of variation in other counties varies from 12 per cent. to 21 per cent. (1).

Solicitors for the vendor: *S. S. & E. Reeves & Son.*
Solicitors for John Prys-Eyton: *Moore, Keily & Lloyd.*

J. E. W.

(1) Subsequently to the above decision the following notice was issued :—

For the convenience of vendors and owners of impropriate tithe rentcharge, notice is hereby given that, subject to any special order, impropriate tithe rentcharge in the several counties in Ireland may, until the commencement of the next statutory period of variation thereof, be redeemed on the consent of the parties' solicitors, at the number of years' purchase set opposite the name of said counties respectively in the schedule hereto.

By order,

HUGH POLLOCK, *Registrar.*

25th November, 1913.

Table showing the number of years' purchase at which impropriate tithe rentcharge may be redeemed in the several counties in Ireland.

Antrim,	21	Kerry,	20½	Monaghan,	20½
Armagh,	20½	Kildare,	22½	Queen's,	21½
Carlow,	21½	Kilkenny,	22	Roscommon,	21½
Cavan,	21	King's,	22½	Sligo,	21
Clare,	21	Leitrim,	20½	Tipperary,	21½
Cork,	21½	Limerick,	21½	Tyrone,	21
Donegal,	21	Londonderry,	21½	Waterford,	21½
Down,	21	Longford,	21	Westmeath,	22
Dublin,	22	Louth,	21	Wexford,	22½
Fermanagh,	20½	Mayo,	22	Wicklow,	22
Galway,	21½	Meath,	23		

[Rep.]

IN THE MATTER OF THE ESTATE OF ELIZABETH ARDAGH.

Wylie, J.
1913.
Nov. 20.
Dec. 2.

Land Purchase Acts—Practice—Sale of settled lands—English Public Trustee sole existing trustee of the settlement—Payment out of the residue to him—Public Trustee Act, 1906 (6 *Edw.* 7, *c.* 55), *s.* 5, *sub-s.* 1

Where Irish lands, subject to the trusts of an English settlement, were sold under the Land Purchase Acts, and it appeared that the English Public Trustee had been appointed sole trustee of the settlement by the person thereby nominated for the purpose of appointing trustees, and that the settlement authorized a sole trustee to receive capital moneys arising under the Settled Land Acts, the residue of the purchase-moneys arising from such sale were paid out to the English Public Trustee.

In re Leslie's Hassop Estates ([1911] 1 Ch. 611) applied and followed.

Quaere:—Has the Court power to appoint the English Public Trustee trustee of a settlement in his capacity as such Public Trustee?

QUESTION arising on the ruling of the final schedule, as to whether the Public Trustee (England) had power to act as trustee of the settlement comprising the lands sold in this matter under the Land Purchase Acts, and to receive payment of the residue of the purchase-moneys arising from the sale of such lands?

The facts were as follows:—By indenture of post-nuptial settlement, dated the 7th March, 1905, and made between William M. Ardagh, described as of the town of Tenby, in the county of Pembroke, of the first part, Elizabeth Ardagh, his wife, of the second part, and two trustees, resident respectively in London and Tenby, of the third part, the lands sold in this matter, situated in county Waterford, were limited to certain uses under which the said Elizabeth Ardagh was beneficially entitled in possession to an estate for her life. And by the said settlement it was (*inter alia*) declared that the trustees should be trustees for the purposes of the Settled Land Acts, 1882 to 1890; also that capital moneys arising under the said Acts might be paid to and received, and all the

Wylie, J. 1913.

In re ARDAGH'S ESTATE.

powers and authorities by the said Acts conferred on trustees might be exercised, by one trustee alone; also that capital moneys arising under the said Acts might be invested in the purchase of hereditaments for an estate in fee-simple to be situate in Ireland, England, or Wales; also that the power of appointing a new trustee or new trustees of the said settlement should be exercisable by the said William M. Ardagh and Elizabeth Ardagh, during their joint lives and by the survivor of them during his or her life.

William M. Ardagh died on the 26th September, 1906. Elizabeth Ardagh subsequently entered into agreements for the sale of the lands to the tenants thereof under the Land Purchase Acts. By indenture dated the 5th November, 1909, reciting (*inter alia*) that one of the trustees of the said settlement had died, and that the other trustee desired to be discharged from the trusts thereof, Elizabeth Ardagh, in exercise of the power vested in her as the person nominated for the purpose by the settlement, appointed the Public Trustee (England), as such, to be trustee thereof in the place of the said two trustees, and thereby declared that the Public Trustee should hold the purchase-moneys arising from the sale of the lands so agreed to be sold upon the trusts applicable thereto by virtue of the said settlement. The Public Trustee accepted the trust. The Public Trustee accordingly appeared on the final schedule as claimant to the residue. On the ruling of the final schedule the question was adjourned in order to enable the Public Trustee to be communicated with.

A. V. Matheson, for the vendor, asked that the residue should be paid out to the English Public Trustee. Having regard to the provisions of the settlement, and to the terms of sect. 5 of the Public Trustee Act, 1906, there was clearly power in the person nominated for the purpose of appointing trustees by the settlement to appoint the Public Trustee sole trustee of the settlement in the place of the two trustees originally appointed. See *In re Leslie's Hassop Estates* (1).

(1) [1911] 1 Ch. 611.

Gerald Brunskill, for the English Public Trustee :—

This is not an application to appoint the English Public Trustee trustee of the settlement. He is already properly appointed; and the Court should recognize the appointment, and pay out the residue to him. Under sect. 1 of the Public Trustee Act, 1906, the office of Public Trustee was established. By sect. 2, sub-sect. 2, he is given the same rights, and is subject to the same liabilities, as an ordinary trustee. By sect. 5 he may be appointed to be trustee of any will or settlement either as an original or as a new trustee, and he may be appointed to act as sole trustee. By sect. 17 it is provided that the Act shall not apply to Ireland. That means that, for the purposes of the Act, Ireland must be treated as a foreign country, and land situated in Ireland as situated abroad. A domiciled Englishman owning property situated abroad would have full power to appoint the Public Trustee, or any private individual, trustee of a settlement comprising such property, and the trustee so appointed would have power to administer the trusts relating to it, provided such trusts did not conflict with the law of the country in which such property was situated: see *In re Piercy* (1). The *lex loci* must apply to real property. In appointing a trustee, the Courts act *in personam*, and therefore it has always been held as a principle that the trustee must be subject to the jurisdiction of a Court of Equity: see Lewin's Law of Trusts (10th ed.), at p. 29. The English Public Trustee could be made amenable to the jurisdiction of the Courts in this country in the same way as an ordinary trustee resident in England. In *In re Hill's Trusts* (2) the Court went so far, under special circumstances, as to appoint two aliens trustees of the settlement. Here no such consideration arises, as the Public Trustee is already validly appointed trustee of the settlement.

WYLIE, J. :—

I have no difficulty about this matter. I have considerable doubt as to whether I would have jurisdiction to appoint the English Public Trustee trustee of a settlement in his capacity of Public

(1) [1895] 1 Ch. 83. (2) W. N. (1874), 228.

Wylie, J. 1913. *In re* ARDAGH'S ESTATE.

Trustee. That might be treating the Act as extending to Ireland. The question, however, does not arise here, as I find the English Public Trustee already validly appointed trustee of this settlement, which is an English settlement; and that being so, I will deal with him as if he were an ordinary trustee. The question that first occurred to my mind was, whether there was power to appoint him sole trustee of the settlement in the place of the two trustees originally appointed. But, having regard to the provisions of sect. 5 of the Public Trustee Act, 1906, and to the terms of the settlement, I think that the person who, under the settlement, had power to appoint trustees, had power to appoint the Public Trustee sole trustee of the settlement, even for the purposes of the Settled Land Acts. I have no hesitation in following *In re Leslie's Hassop Estates* (1) on that point.

Accordingly, having the English Public Trustee validly appointed as sole existing trustee of the settlement, I will pay out the residue to him.

Solicitors for the vendor: *I. Thornton & Son.*

Solicitors for the English Public Trustee: *Reed and Macnab.*

J. E. W.

(1) [1911] 1 Ch. 611.

STEVENS *v.* NATIONAL TELEPHONE COMPANY, LIMITED.

(1911. No. 609.)

Ross, J.
1912.
Nov. 27, 28.
Dec. 16, 20.

EDWARD LEE & CO., LIMITED, *v.* THE SAME.

(1911. No. 634.)

Telegraph Acts—Erecting telegraph-posts and wires—"Garden"—"Pleasure-Ground"—Consent of street authority given subsequent to erection—Pole erected within ten yards of dwelling-house in a town—Telegraph Act, 1863 (26 & 27 *Vict. c.* 112), *ss.* 21, 22.

Section 21 of the Telegraph Act, 1863, permits a telegraph company, within the limits of a town having a certain population, and with the consent of the street authority, to place and maintain a telegraph across any land not being laid out as building land, or not being a garden or pleasure-ground, provided that twenty-one days' previous notice is published by the company stating that they have obtained such consent, and describing the intended course of such telegraph.

Held, that a pleasure-ground, to come within the meaning of the section, should have some equipment of a more or less permanent character that would be of service to persons frequenting it for the purpose of recreation; and that a yard used by the plaintiff mainly for the purpose of his business, and without such equipment, but in which his children were in the habit of playing, was not such a "pleasure-ground."

Held, also, that the exception in the section is only made in respect of *land* which is not a pleasure-ground or garden, and not in respect of buildings, and that a garden on the roof of a building was not within the exception.

Held, also, that the consent of the street authority must be obtained before the erection of the telegraph, and that a subsequent consent is not sufficient.

Section 22 of the same Act, which prohibits a telegraph company from placing a telegraph-post within ten yards of a dwelling-house, except as therein provided, applies only to rural districts, or to cases where telegraph-posts are put up on property of one person with his consent, but at a distance of less than ten yards from the house of another person.

Ross, J.
1912.

STEVENS *v.* NATIONAL TELEPHONE CO., LTD.

LEE & CO., LTD. *v.* THE SAME.

These two actions were heard together.

STEVENS *v.* NATIONAL TELEPHONE COMPANY, LIMITED.

The action was brought by the plaintiff for an injunction directing the defendants to remove all telephonic and telegraphic apparatus, poles, wires, fixtures, and fittings connected therewith, placed by the defendants in, under, or upon, over, along, or across the plaintiff's premises at 2 Northumberland Avenue, Kingstown.

EDWARD LEE & CO., LIMITED, *v.* NATIONAL TELEPHONE COMPANY, LIMITED.

The action was brought by the plaintiffs, a limited company carrying on business at various places in Dublin and Bray, for an injunction directing the defendants to remove all telephonic and telegraphic apparatus, &c., placed by the defendants in, under, upon, over, along, or across the plaintiffs' premises, situate at Kingstown; Abbey Street and Mary Street, Dublin; Rathmines; and Bray. The facts in both cases sufficiently appear in the judgments of Ross, J. Sections 2, 5, 21, and 22 of the Telegraph Act, 1863 (26 & 27 Vict. c. 112), and sections 3, 5, and 6 of the Telegraph Act, 1892 (55 & 56 Vict. c. 59), were referred to in the arguments. On the meaning of the term "pleasure-ground," *Cooper* v. *Pearse* (1) and *Gilbert* v. *Tomison* (2) were cited.

Carrigan, K.C., and *Devitt*, for the plaintiff Stevens.

S. L. Brown, K.C., and *Lee*, for the plaintiffs Edward Lee & Co., Limited.

The Attorney-General (*The Rt. Hon. Ignatius J. O'Brien, K.C.*), *Dromgoole, K.C.*, and *V. Rice*, for the defendants.

Samuels, K.C., held a watching brief for the Postmaster-General.

(1) [1896] 1 Q. B. 562. (2) 4 D. & R. 222.

STEVENS *v.* NATIONAL TELEPHONE COMPANY, LIMITED.

ROSS, J.:—

The plaintiff is a furniture manufacturer and furniture remover, residing at No. 2 Northumberland Avenue, Kingstown. The plaintiff carries on his business in a workshop and out-buildings erected at the rear of his dwelling-house. The defendants, who were a limited liability company, on 24th April, 1911, erected a large telephone-pole, about 35 feet in height, in Northumberland Avenue, within three yards of the front of his house. They also erected a similar pole at the rear of his house in a laneway not belonging to the plaintiff. They have suspended and stretched numerous telephone-wires between the two poles, so that the wires extend across the plaintiff's premises. The plaintiff claims an injunction directing the defendants to remove the apparatus, wires, and poles. He also claims damages for trespass.

An injunction cannot be granted, because the defendants are a company in liquidation, and by an agreement with the Postmaster-General have transferred all their effects to him as from the 31st December, 1911. The Postmaster-General is not a party to this action, and nothing done in these proceedings can be binding on him.

In respect of the pole erected in the lane at the rear of the premises, the plaintiff complains that he has been prevented from opening out a gateway from his premises into the laneway. His lease, however, shows that he has no right of way into the lane, and this cause of action disappears. As regards the claim for trespass, there has been no damage done to the premises that would justify an action in the Chancery Division. There remains the claim of trespass in respect of the wires stretched across the plaintiff's residence and outbuildings.

The defence is a justification under the Telegraph Act of 1863. The original company was in effect prohibited by the 21st sect. of the statute from placing or maintaining a telegraph over a garden or pleasure-ground. Now there is a space between the rear of plaintiff's dwelling-house and his workshop, over which

Ross, J.
1912.
STEVENS
v.
NATIONAL
TELEPHONE
CO., LTD.

the wires pass. It is not contended that it is a garden, but it is contended that it is a pleasure-ground. I am, however, satisfied on the evidence that this place is used mainly for the purposes of his business. The only way by which the furniture can pass from the workshop to the street is through this space. The plaintiff's children no doubt are in the habit of playing there; but this is not enough to make the yard a pleasure-ground within the meaning of the Act. A pleasure-ground, I think, ought to have some equipment of a more or less permanent character that would be of service to persons frequenting it for the purpose of recreation. This yard has nothing of the kind, and the casual user of it by the children cannot have the effect contended for.

The next contention of the plaintiff is, that the telegraph-pole in Northumberland Avenue is within three yards of the plaintiff's dwelling-house, and that the company are prohibited by sect. 22 of the Act of 1863 from placing a telegraph or a post within ten yards of a dwelling-house.

If this section applies to this case, the point is fatal; the pole is within the prohibited distance. But does it apply? This throws us back to a consideration of the earlier sections. Under sect. 6, the Company obtains very wide powers. Subject to restrictions and provisions they may place and maintain a telegraph and posts over any land or building, or over any railway or canal, or shore of any tidal water. Then follow the provisions and restrictions mainly concerned with the construction of telegraphs in streets and public roads. Section 22 begins with the words "subject and without prejudice to the foregoing provisions." It is contended that this section is not dealing with houses in towns at all, that the whole matter in so far as towns and streets are concerned has already been dealt with by the prior sections, and that the section applies only to rural districts, or to cases where telegraph-posts are put up on property of one person with his consent but at a distance of less than 10 yards from the house of another person. I agree with this argument, and am of opinion that the section does not apply to this case. I do not find it necessary, having regard to my decision in the case, to go into my reasons with particularity.

The next point I have to consider is, whether the post in

Northumberland Avenue has been lawfully erected. In the first place, it was incumbent on the Company to obtain the consent of the Urban District Council of Kingstown. In the next place, they were bound to publish a notice stating that they had obtained the consent of such body. A general consent had been obtained on 3rd of June, 1909, to the exercise of powers in relation to the execution of such works as may have been, or might be, delegated to the Company by the Postmaster-General under the Telegraph Act, 1892. It was, however, expressly provided that such consent should not in any way relieve the Company from the obligation to apply in such case for the specific consent of the Council in accordance with the provisions of the Telegraph Act, 1863, in respect of any works the Company might require to undertake.

On the 27th October, 1910, the Company wrote to the Council for permission to erect this pole on a spot in Northumberland Avenue, on the east side, indicated and marked on an enclosed plan. On the 10th of November the Council replied, refusing the permission asked for. Their letter goes on to make a suggestion that the pole might be erected on the west side of Northumberland Avenue. This was well understood by the Company. The memorandum of their engineer, of 29th November, 1910, contains these words—"We have already applied for a pole in Northumberland Avenue and been refused." A letter was written on the 19th of May, 1911, by the Company to the Council, stating that they were arranging to have the pole erected in accordance with their suggestion. The required consent was given, but it was not till the month of May. The advertisement stating that the necessary consent of the urban body had been obtained appeared on 9th April, 1911. This advertisement stated what was not the fact, and therefore the publication of the required notice has never taken place. The pole itself was erected before the consent of the urban council had been obtained, and was, therefore, erected without proper authority. The subsequent consent cannot affect the matter.

Under these circumstances, all I can do is to declare that the pole in Northumberland Avenue has been erected without lawful authority, and that the wires dependent thereon and

Ross, J.
1912.
LEE & CO., LTD. *v.* NATIONAL TELEPHONE CO., LTD.

extending over the plaintiff's premises have been placed and maintained without lawful authority. I shall award £1 damages in respect of the actual trespass, and give the plaintiff the costs of the action.

EDWARD LEE & CO., LIMITED *v.* NATIONAL TELEPHONE COMPANY, LIMITED.

Ross, J.:—

Dec. 20.

The plaintiffs are a limited liability company carrying on an extensive business in Abbey Street, Dublin, in Rathmines, in Kingstown, and in Bray. They are the owners of certain private houses and gardens, known as Dungar Terrace, Kingstown.

The plaintiffs entered into contracts with the defendants for the connection of the plaintiffs' four business-houses with the defendants' telephonic system. Such contracts contained a clause by which the plaintiffs undertook to provide, free of charge, all facilities for their own and other wires over any property under their control. The plaintiffs objected to the wires crossing their property at Dungar Terrace, Kingstown, and finally requested their removal. The defendant Company then informed the plaintiffs that they intended to rely on the clause binding the plaintiffs to provide them facilities over any property under their control. The plaintiffs then terminated their contracts with the defendants as soon as it was possible for them to do so, and there is now no existing agreement between the plaintiffs and the defendant Company.

The plaintiffs' complaint is in respect of three sets of these premises, that is to say, Dungar Terrace, Kingstown; Rathmines Terrace; and 7 Upper Abbey Street. The plaintiffs allege that in all these cases the wires pass over property that consists of gardens and pleasure-grounds. Taking the case of Dungar Terrace, Kingstown, I have in the previous case held that the same telegraph-pole erected in Northumberland Avenue was erected without lawful authority; but as the Postmaster-General is not a party to this action, I cannot grant an injunction. I shall, accordingly, make the same declaration as in the last case.

In respect of the Rathmines premises I find as a fact that the wires pass over gardens and pleasure-grounds, and I declare that they were maintained without lawful authority from 19th July, 1911, to 31st December, 1911.

In respect of the Abbey Street premises a different question arises. The gardens are raised or roof-gardens made on buildings already erected. Are these "gardens" within the meaning of sect. 21? The original company are empowered to place and maintain their telegraphs over any building or land, not being a garden or pleasure-ground. The exception is only made in respect of *land* when it is a garden or pleasure-ground. It is not made in respect of buildings. Therefore, a garden existing on the roof of a building is not, I think, within the section.

I refuse to make any declaration in respect of the Abbey Street premises. A sum of £5 has been paid into Court by way of damages, and I find that sum sufficient for the actual damage caused. As, however, the main purpose of the action was to have it determined whether the wires were lawfully or unlawfully extended over the plaintiffs' premises, I order the defendants to pay the costs of the action.

Solicitor for the plaintiff Stephens: *C. J. Reddy.*
Solicitors for the plaintiffs E. Lee & Co., Ltd.: *Hayes & Sons.*
Solicitors for the defendants: *Little & Cullen.*
Solicitor for the Postmaster-General: *E. R. Bate.*

D. M. S.

M. R. 1913.

O'SHEA *v.* CORK RURAL DISTRICT COUNCIL.

Nov. 12, 13.

Local Government — Labourers (Ireland) Acts — Improvement Scheme — Application for letting of cottage — Right of preference — Scheme not founded on applicant's representation — Special damage — Joinder of Attorney-General — Labourers (Ireland) Act, 1883 (46 & 47 *Vict. c.* 60), *s.* 13 — *Labourers (Ireland) Act*, 1906 (6 *Edw.* 7, *c.* 37), *s.* 29 — *Practice — Action against public body — Naming special defendants — Costs.*

The defendants had acquired a plot of land under an improvement scheme under the Labourers (Ireland) Acts and built a cottage on it. The plaintiff, who was an agricultural labourer, but who had not signed the representation on which the scheme was founded, and was not one of the persons on whose representation it was founded, applied to the defendants to have the first letting of the cottage made to him. No other person, qualified to have a letting made to him under the Acts, applied for a letting. The defendants rejected the plaintiff's application, and let the cottage to a person not an agricultural labourer. The plaintiff having brought an action claiming an injunction and damages—

Held, that as no private legal right of the plaintiff had been infringed, he could not sustain the action.

Held also, that even if the Attorney-General were joined as a plaintiff, the action would not be maintainable.

Tevlin v. *Lisnaskea Rural District Council* ([1914] 2 I. R. 15) distinguished.

When misconduct in the performance of their duties is alleged against a public body, and it becomes necessary to take legal proceedings against them, the individual members who are principally responsible ought to be made special defendants for the purpose of visiting them with the costs of the action.

TRIAL OF ACTION.

Under the Cork Rural District Labourers (Opposed) Order (No. 2), 1908, the Cork Rural District Council were authorized to acquire a plot, numbered 2381*a*, containing 1A. 0R. 14P., at Gurranebraher in the Cork Rural District. The representation upon which this plot was acquired was signed by a man named J. Collins. A labourer's cottage was subsequently erected on this plot; and at their meeting on 6th June, 1912, the rural district council appointed Richard Casey tenant of the cottage,

the original applicant, J. Collins, having stated that he did not require it. This appointment was made subject to the approval of the councillor for the division in which the cottage was situated. Objection having been taken by him, at a meeting of the rural district council held on the 20th June, 1912, both Casey and the plaintiff were proposed and seconded, and Casey was appointed tenant by 16 votes to 5. The plaintiff was an agricultural labourer residing in the district, while Casey was not an agricultural labourer, but was employed in the City of Cork, and the attention of the rural district council was called to this fact by a letter from the Local Government Board, which was read at the meeting of the council on the 18th July, 1912.

The rural district council having persisted in retaining Casey as tenant, the present action was brought, in which the plaintiff sought an injunction to restrain the defendants (1) from letting the cottage for which the plaintiff had applied, to any person other than an agricultural labourer; (2) from letting the said cottage to any person without complying with the provisions of the Labourers (Ireland) Acts with regard to giving a preference in the said letting to agricultural labourers who had signed the representation upon which the scheme for acquiring the said plot and erecting the said cottage was founded; and for damages. The writ was issued and service was accepted on the 4th November, 1912.

After action brought Casey gave up possession of the cottage to the council, who at their meeting on the 5th December, 1912, appointed Bridget Casey (daughter of Richard Casey), who was an agricultural labourer, working in the rural district at wages of 4*s*. a week, to be tenant of the cottage. On this occasion the plaintiff was also proposed as tenant, but his application was defeated by 22 votes to 17.

The statement of claim concluded with an allegation that "by reason of the defendants' failure to carry out the provisions of the Labourers (Ireland) Acts as aforesaid in letting the said cottage and plot, the plaintiff is unable to obtain any suitable or proper house accommodation for himself and his family."

M. R. 1913.

O'SHEA v. CORK RURAL DISTRICT COUNCIL.

Serjeant M'Sweeny, K.C. (with him *J. M. FitzGerald*), for the plaintiff:—

We rely on the plaintiff's status as an agricultural labourer, residing in the district, and in an insanitary cottage, and on the fact that he has applied for this cottage. A representation was made on his behalf, and the Labourers (Ireland) Act, 1906, sect. 29, sub-sect. 2, gives a preference to those labourers who have made a representation, or on whose behalf a representation has been made.

Hon. Cecil Atkinson, and *Serjeant Sullivan, K.C.*, for the defendants:—

The plaintiff's claim can only be supported on the ground that he comes within the provisions of sect. 29 of the Labourers (Ireland) Act, 1906; here the cottage was erected under Scheme No. 7, on a representation made by one Collins; the cottage for which the plaintiff made a representation was under Scheme No. 8, therefore, he does not come within sect. 29: *Marron* v. *Cootehill R.D.C.* (1). Unless sect. 29 helps the plaintiff he can only succeed on the ground of having suffered special damage, otherwise he must sue as a relator in the name of the Attorney-General. If this is not so, any other agricultural labourer in the district who applied for a cottage and did not get one, can bring an action against the defendants: *Attorney-General* (*Annally*) v. *Guardians of the Ballymahon Union* (2). There is ample jurisdiction to invoke the name of the Attorney-General, who will insist on a solvent relator: *Attorney-General* (*Humphreys*) v. *Governors of Erasmus Smith's Schools* (3). The plaintiff has not suffered special damage any more than a ratepayer suffers special damage by reason of the extravagance of a public body for which he, amongst other ratepayers, will have to pay: *Weir* v. *Fermanagh County Council* (4). [*J. M. FitzGerald*: We ask, if necessary, to have the Attorney-General joined as plaintiff. We have his *fiat*.] No such amendment has ever been granted, except on an interlocutory application

(1) Unreported.
(2) 21 L. R. I. 534.
(3) [1910] 1 I. R. 325.
(4) [1913] 1 I. R. 193.

before trial, and on the terms of the plaintiff paying all costs up to the date of the amendment: *Attorney-General* (*Rhondda Urban District Council*) v. *Pontypridd Waterworks Co.* (1). [O'CONNOR, M.R.:— Supposing the action had been commenced by the plaintiff in the name of the Attorney-General, could he even then succeed? Has he, as an agricultural labourer, such a status as would enable him to bring the action, even as a relator? He is not a ratepayer, and he does not come within sect. 29 of the Labourers (Ireland) Act, 1906.] The plaintiff's counsel say that because a labourer can make a representation, that gives him status as a relator; but a representation only applies to a particular scheme, and the plaintiff made none in respect of the scheme under which this cottage was erected. (They also referred to *Ayscough* v. *Bullar* (2); *Attorney-General* v. *Guardians of Merthyr Tydfil Union* (3); *Tevlin* v. *Lisnaskea Rural District Council* (4); *Irish Society* v. *Fleming* (5).)

J. M. FitzGerald, in reply:—

In *Boyce* v. *Paddington Borough Council* (6) the Attorney-General was added as a plaintiff in the Court of Appeal. The head-note there runs—"A plaintiff can sue without the Attorney-General—1. where an interference with a public right involves interference with some private right of the plaintiff; 2. where no private right of the plaintiff is interfered with, but he, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right." We distinguish *Weir's Case* (7), because here there is special damage, whereas in that case there was only a prospect of damage to the plaintiff and an indefinite number of other ratepayers. The plaintiff being, with all other agricultural labourers, entitled to the benefit of the Labourers Acts, and the administration of these Acts being vested in the defendants, who are forbidden by sect. 13 of the Labourers (Ireland) Act, 1883, to let a cottage to any person other than

(1) [1908] 1 Ch. 388.
(2) 41 Ch. D. 341.
(3) [1900] 1 Ch. 516.
(4) [1914] 2 I. R. 15.
(5) [1911] 1 I. R. 323, 353.
(6) [1903] 1 Ch. 109.
(7) [1913] 1 I. R. 193.

M. R. 1913. O'Shea v. Cork Rural District Council.

an agricultural labourer, when this cottage became vacant, it was the duty of the defendants to let it to an agricultural labourer. The only applicant at the meeting of 20th June, 1912, to whom no objection was taken, was the plaintiff, who had then a right to be elected, unless the defendants adjourned their meeting, which they did not do. As to what constitutes a right sufficient to support a private action, see Lord Halsbury's Laws of England, vol. xxiii, Art. 174, p. 100. (He also referred to R. S. C., O. 16, r. 13; *Attorney-General* (*Spalding Rural District Council*) v. *Garner* (1).)

O'Connor, M.R.:—

I am clearly of opinion that this action is not rightly constituted. It could only be maintained by the Attorney-General at the relation of the plaintiff. The action is brought to restrain the district council from committing a breach of trust in respect of public property. In my opinion the case comes within the principle of *Weir's Case* (2), in which Palles, C.B., says (at p. 198), "The suit is one to enforce the trusts attaching to the district rates, and to restrain their misapplication; and the trust so sought to be enforced is, in my opinion, plainly a public one. The rule in relation to such a suit is unquestioned; the plaintiff, or at least one of the plaintiffs, must be the public, represented by the Crown, who sues by its officer, the Attorney-General. In other words, before our Judicature Act, the suit should have been by information, or by information and bill, and not by bill merely. This rule is adopted from the common law, which in the case of an injury to the public—as, for instance, a ditch being made athwart a public way—gave for remedy originally 'presentment in the leet,' for which, later on, the present practice of indictment was substituted; unless, to use the words of Lord Coke (1 Co. Litt. 56 (*a*)), 'any man hath a *particular* damage, as if he and his horse fall into the ditch, whereby he received hurt and loss, then for this special damage, *which is not common to others*, he shall have an action on his case'; and the reason of the rule is declared by Lord Coke to be 'for the avoiding of suits, for

(1) [1907] 2 K. B. 480. (2) [1913] I I. R. 193.

if any one man might have an action, all men might have the like.' "

The present action is brought by the plaintiff in two characters, as an agricultural labourer, and as a ratepayer. If one ratepayer can bring an action, then every other ratepayer can, and we should have the very thing that the policy of the law forbids. It is, however, admitted that he is not in fact a ratepayer. Has he, then, any right of action in his character of agricultural labourer? If he has, the right of action is common to him and all other agricultural labourers in the district, unless he can show special damage. It was urged that he had a special right which was infringed, and if he stood in the position of the plaintiff in *Tevlin* v. *Lisnaskea R.D.C.* (1) he would be right in this contention, because sect. 29, sub-s. 2, of the Labourers (Ireland) Act, 1906, on which that action turned, gives a preferential right under certain circumstances; and if that preferential right is infringed, there is special damage, and therefore a cause of action. But here the plaintiff had no preferential right; it was open to the district council to give the cottage to any agricultural labourer in the district; and if they acted wrongly in passing over the plaintiff, it does not follow that any private legal right of his was infringed; it is not enough for him to say that he is the only agricultural labourer who applied for the cottage. That being so, he cannot maintain the action in his individual capacity. In the case of *Boyce* v. *Paddington Borough Council* (2), which has been relied on by the plaintiff, it was alleged that there was an interference with a private right, viz. the access of light to the plaintiff's windows; it was there held by Buckley, J., that it was not necessary that the Attorney-General should be joined as a plaintiff, inasmuch as the plaintiff was suing either in respect of an alleged private right, or in respect of an alleged interference with a public right from which he personally sustained special damage.

For these reasons I should be obliged to dismiss the action with costs, unless the amendment asked for (to have the Attorney-General made the plaintiff) is to be granted. But before the

(1) [1914] 2 I. R. 15. (2) [1903] 1 Ch. 109.

M. R. 1913.

O'Shea v. Cork Rural District Council.

plaintiff establishes his right to have the amendment made, he must show that even if it were made there would be, at all events, a possibility of success. In my opinion, even if the application were granted, the Attorney-General would not succeed in the action, inasmuch as the plaintiff has no interest in the subject-matter merely as an agricultural labourer. He had nothing more than a mere chance of being selected by the district council, who might equally have selected any other agricultural labourer in the district.

I shall add, for the guidance of members of the Bar, that, in my opinion, in actions of this kind when misconduct in the performance of their duties is alleged against a public body, and when it becomes necessary to take legal proceedings against it, the individual members who are principally responsible ought to be made special defendants for the purpose of visiting them with the costs of the action. It is very unsatisfactory for ratepayers who take proceedings in the interest of their body to find that all the costs must eventually come out of their own pockets when in justice they ought to be paid by individual wrongdoers.

Solicitor for the plaintiff: *Edward Fitzgerald.*

Solicitors for the defendants: *J. C. and A. Blake.*

A. H. W.

IN THE MATTER OF THOMAS CRONIN, AN OWNER OF LAND.

Madden, J.
1913.
Nov. 25.

Statute of Limitations—Mortgage—Welsh mortgage—Inclusion in mortgage deed of power of sale—Real Property Limitation Act, 1874 (37 & 38 *Vict.* c. 57), s. 7.

In the year 1890, A by deed conveyed certain lands to B and C, as tenants in common in fee-simple, to secure a sum of £300, therein recited to be due, with a proviso for redemption on payment of the principal money, the deed being silent as to interest. There was a provision that the powers and remedies conferred on mortgagees by the Conveyancing and Law of Property Act, 1881, were thereby given to B. On the execution of the deed, B and C went into possession, and had since remained in possession without accounting to A for the rents and profits, or having given any acknowledgment in writing of his title.

Held, that the express inclusion in the deed of a power of sale showed that it was not intended to operate as a Welsh mortgage, and that A's right to redeem was barred by the Statute of Limitations.

APPEAL from the Registrar of Titles. The facts and the questions of law involved appear from the following statement of facts admitted by the parties :—

Statement of facts admitted by both parties. The facts of the case are as follows :—

1. By vesting order, dated the 30th day of April, 1889, part of the lands of Ballybeg, consisting of 68 acres and 36 perches, statute measure, situate in the Barony of Trughernacloney and county of Kerry, were vested in fee-simple in Thomas Cronin (the applicant herein), together with rights of cutting turf for consumption on the said holding, but not for sale, on part of the lands of Knockalomin, in the said barony and county, subject to an annuity of £45, payable to the Irish Land Commission in pursuance of the Purchase of Land (Ireland) Act, 1885, for a term of forty-nine years from the 1st day of May, 1889.

2. By indenture dated the 25th day of June, 1890, and made between Thomas Cronin (the above-mentioned applicant) of the

Madden, J. 1913.

In re CRONIN.

first part, and Patrick Cronin and Elizabeth Clifford (now Cronin), the cautioners in the matter, of the second part, Thomas Cronin, as beneficial owner, conveyed to the said Patrick Cronin and Elizabeth Clifford, as tenants in common in fee-simple, part of the lands of Ballybeg aforesaid, consisting of one half part thereof, therein described as the northern portion of the said lands, together with the right of cutting turf as aforesaid, to secure a sum of £300 therein recited to be due by the said Thomas Cronin to the said Elizabeth Clifford, with a proviso for redemption as therein contained. The original of the said indenture is lost, but a copy, admitted by the parties to be a draft or true copy of the original, was read at the hearing of the matter, to which, for greater accuracy, the parties beg to refer. A memorial of the said indenture was duly registered on the 10th day of June, 1897.

3. The said Thomas Cronin and the said Patrick Cronin are lawful brothers, and the said Patrick Cronin married the said Elizabeth Clifford (now Cronin) soon after the date of the said indenture of the 25th day of June, 1890.

4. The said Patrick Cronin and the said Elizabeth Cronin (formerly Clifford) on the execution of the said indenture of the 25th day of June, 1890, entered into possession of the said northern portion of the said lands of Ballybeg, and have ever since remained in possession thereof, and have, in pursuance of the said indenture, paid to the said Thomas Cronin half of the said annuity of £45, and half of the rates and taxes payable out of the said lands of Ballybeg. The said Thomas Cronin pays the whole annuity to the Irish Land Commission, and is the only person recognized by the Land Commission as owner of the said lands.

5. The said Patrick Cronin and the said Elizabeth Cronin have never been called on to account for the profits of the northern portion of the said lands of Ballybeg by the said Thomas Cronin, nor have they or either of them ever so accounted to the said Thomas Cronin. No acknowledgment in writing has been given to the said Thomas Cronin by the said Patrick Cronin and the said Elizabeth Cronin, or by either of them, within the meaning of sect. 7 of the Real Property Limitation Act of 1874.

6. Messrs. F. & C. Downing, solicitors for Patrick Cronin and Elizabeth Cronin, by letter dated 29th December, 1898, requested Thomas Cronin to execute a conveyance to the said Patrick Cronin and Elizabeth Cronin of half of the said lands of Ballybeg, of which they were in possession as aforesaid, and threatened in default of compliance with the said request to take immediate proceedings to raise the amount due for principal and interest on foot of the said indenture of the 25th June, 1890. No such proceedings were ever taken.

7. A civil-bill process, dated 23rd January, 1899, was brought by the said Thomas Cronin as plaintiff against the said Patrick Cronin as defendant, to recover the sum of £15 15*s.* 8*d.*, money paid by the plaintiff for the use of the defendant, being for Land Commission annuity and poor rates payable by the said Patrick Cronin under the provisions of the said indenture of the 25th June, 1890. A decree was obtained by the plaintiff for the said sum.

8. A first application was made by Thomas Cronin in 1908 to be registered as full owner of the said lands of Ballybeg vested in him by the said vesting order, dated the 30th April, 1889. The objection of Patrick Cronin and Elizabeth Cronin to such registration (claiming to be owners as tenants in common of the said northern half of the said lands of Ballybeg) has given rise to the issue to be decided in this matter.

9. The matter of the said application was heard by the Registrar of Titles on the 22nd May, 1913, and he thereupon ordered that the claim of the said Patrick Cronin and Elizabeth Cronin to an absolute interest in that portion of the said lands known as the northern portion thereof be allowed, subject to the whole of the annuity payable to the Land Commission, and that Thomas Cronin be registered as full owner of the other portion of the said lands, subject also to the payment of the said annuity. From the said order of the Registrar the said Thomas Cronin duly appealed. On the above facts it was contended by counsel on behalf of the said Thomas Cronin that the indenture of the 25th day of June, 1890, was in the nature of a Welsh mortgage, and by virtue of that fact was still a subsisting security, and that the said Thomas Cronin's right of redemption was not barred by the operation

Madden, J. 1913. *In re* CRONIN.

of sect. 7 of the Real Property Limitation Act, 1874, and that the said Thomas Cronin was entitled to be registered as full owner of the whole of the said lands of Ballybeg, subject to the said mortgage of the 28th June, 1890. It was contended on behalf of the said Patrick Cronin and Elizabeth Cronin that the said indenture of the 25th June, 1890, was not a Welsh mortgage, and that the right of the said Thomas Cronin to redemption under the said indenture was barred by the operation of sect. 7 of the Real Property Limitation Act, 1874, relying on the proviso for redemption in the said indenture contained, and the provisions of the Conveyancing Act, 1881, sect. 19, as to the rights of sale by mortgagees; and that the said Patrick Cronin and Elizabeth Cronin were entitled to be registered as full owners as tenants in common of the northern half of the said lands of Ballybeg.

H. D. Conner, K.C., and *Patrick Kelly*, for the applicant, Thomas Cronin, referred to Fisher on Mortgages (1910), par. 10; *Shields* v. *Shields* (1); *Fenton* v. *Walsh* (2); *Johnston* v. *Moore* (3); *Teulon* v. *Curtis* (4); *Balfe* v. *Lord* (5).

P. D. Fleming, K.C., and *J. M. FitzGerald*, for the cautioners, Patrick and Elizabeth Cronin, contended that the deed was an ordinary mortgage, the express incorporation of a power of sale being inconsistent with an intention to create a Welsh mortgage, and that the mortgagor's right to redeem was barred by sect. 7 of the Real Property Limitation Act, 1874.

MADDEN, J.:—

In this case the parties interested have adopted the convenient course of submitting by their counsel a statement of facts, and a suggestion of the legal questions involved, which I adopt as the basis of my judgment.

By a vesting order, dated the 30th of April, 1889, the lands of Ballybeg, in the county of Kerry, consisting of 68 acres and

(1) 38 I. L. T. R. 188.
(2) 43 I. L. T. R. 54.
(3) 4 N. I. J. R. 218.
(4) 1 Younge, 610.
(5) 2 Dr. & W. 480.

36 perches, were vested in fee-simple in Thomas Cronin, subject to a purchase-annuity payable to the Land Commission for a term of forty-nine years.

Patrick Cronin, brother of Thomas Cronin, married Elizabeth Clifford, and in contemplation of the marriage a deed was executed, dated the 25th of June, 1890, between Thomas Cronin of the one part, and Patrick Cronin and Elizabeth Clifford of the other part. This deed was in form a mortgage of one half of the lands of Ballybeg, executed by Thomas Cronin to Patrick Cronin and Elizabeth Clifford, as tenants in common in fee-simple, to secure the sum of £300. The deed recites that Thomas Cronin was indebted to Elizabeth Clifford in the sum of £300. This sum was not in fact paid to Thomas Cronin, and the deed contains no receipt clause.

The marriage took place on the 25th of June, 1890, and Patrick Cronin and Elizabeth Cronin, his wife, formerly Clifford, entered into possession of the northern portion of Ballybeg, and have ever since remained in possession, paying to Thomas Cronin half of the purchase-annuity of £45, and half of the rates and taxes payable out of the lands of Ballybeg. Thomas Cronin pays the whole annuity to the Land Commission, and he is the only person recognized by them as owner.

The statement of facts states that the said Patrick Cronin and the said Elizabeth Cronin have never been called upon to account for the profits of the northern portion of the said lands of Ballybeg by the said Thomas Cronin, nor have they, or either of them, ever so accounted to the said Thomas Cronin. No acknowledgment in writing has been given to the said Thomas Cronin by the said Patrick Cronin and the said Elizabeth Cronin, or by either of them, within the meaning of sect. 7 of the Real Property Limitation Act of 1874.

The question for decision arises upon an application by Thomas Cronin to be registered as full owner of the lands of Ballybeg, vested in him by the vesting order of April 30th, 1889, and an objection filed by Patrick Cronin and Elizabeth Cronin, who claim to be owners as tenants in common of the northern half of these lands.

Madden, J.
1913.
In re
CRONIN.

This objection came for decision before the Registrar of Titles on the 22nd of May, 1913. On the part of Thomas Cronin it was contended that the deed of the 25th of June, 1890, was in the nature of a Welsh mortgage, and that it is a still subsisting security, in regard to which the mortgagor's right of redemption has not been barred by the statute; and he claimed to be registered as owner of the whole of the lands of Ballybeg, subject to the mortgage for £300 created by the deed of 25th June, 1890. On the part of Patrick and Elizabeth Cronin it was contended that the deed of 1890, under which they entered into possession, was an ordinary deed of mortgage, and they claimed to have acquired a title, as tenants in common in fee-simple, under the 7th section of the Real Property Limitation Act, 1874.

At the time of the hearing before the Registrar the deed of 1890 could not be found, and there was no very clear evidence as to its contents. It appeared to be the result of a family arrangement, and the conduct of the parties was relied on as showing that the receipt of the profits of one-half of the lands was to be treated as the equivalent of a sum of £300 which was not in fact paid. The arrangement, however, took the form of a mortgage, and the Registrar held that there was no evidence to support the conclusion that the lost deed was other than a mortgage in the ordinary form. I should have come to the same conclusion on the evidence before the Registrar. Since then a draft, which has been admitted as a copy of the mortgage, has been found. It is a conveyance of the lands in question to Patrick Cronin and Elizabeth Clifford, by way of mortgage to secure the payment of the sum of £300, with a proviso for redemption on payment by Thomas Cronin to Patrick Cronin and Elizabeth Clifford of the sum of £300. The deed is silent as to interest. It contains this provision—"the powers and remedies conferred on mortgagees under and by virtue of the Conveyancing and Law of Property Act, 1881, are hereby given to the said Patrick Cronin."

Various forms of the security known as a Welsh mortgage are to be found in the books. In its ordinary form it is a contract by way of mortgage by the terms of which it is agreed that the mortgagee

shall take the rents and profits of the land in lieu of interest, until the mortgagor thinks fit to redeem. It is a security of this kind that is alleged on the part of Thomas Cronin. All securities by way of Welsh mortgage have certain points in common. Lapse of time is no bar to redemption, unless it is proved that the mortgagee has held over for the space of twelve years after the debt has been paid by receipt of the rents and profits. It is admitted that if the deed created a security of this kind, Thomas Cronin would be entitled to be registered as owner, subject to a charge of £300. Another feature of all such securities is the absence of a right to foreclose. In this country, sale and not foreclosure is the remedy usually had recourse to. The inclusion in a mortgage deed of a power of sale proves conclusively that it could not be intended to operate as a security of the nature of a Welsh mortgage. Indeed, so inconsistent are the ideas of a Welsh mortgage, and a power of sale in the mortgagee, that it has been suggested that the Conveyancing Act, notwithstanding the generality of the words employed, is inapplicable to securities of this kind: Coote on Mortgages, p. 36. In the present case the power of sale is inserted in the mortgage by the contract of the parties, and not as the independent action of an Act of Parliament. The ruling of the Registrar is therefore affirmed.

Solicitor for Thomas Cronin: *Terence J. Liston.*
Solicitors for Patrick and Elizabeth Cronin: *F. and C. Downing.*

A. H. W.

M. R.
1913.
Nov. 11.
—
Appeal.
Nov. 28.

FORTESCUE *v.* McKEOWN AND OTHERS.

Practice—Contempt of Court—Attachment—Order of Court of first instance reversed by Court of Appeal—Jurisdiction of Court of first instance to enforce by attachment the order of the Court of Appeal—Order XLII, Rule 7.

By an order of the Master of the Rolls the defendants were restrained from proceeding further with the erection and completion of a certain building which the plaintiff alleged obstructed the light coming through his ancient windows. The plaintiff appealed from this order on the ground that it did not include a mandatory injunction commanding the defendants to pull down the building complained of. The Court of Appeal discharged the order of the Master of the Rolls, and ordered the defendants to have the building complained of forthwith pulled down. The defendants disobeyed this order, and the plaintiff thereupon applied to the Master of the Rolls for a writ of attachment for contempt of Court to issue against them. The Master of the Rolls refused the application, being of opinion that the contempt of which the defendants had been guilty was a contempt of the Court of Appeal, and that he accordingly had no jurisdiction to punish it. On an appeal from this decision to the Court of Appeal,

Held, that the Master of the Rolls had jurisdiction to make the order sought for, and that, as the plaintiff was entitled to the order, the issue of a writ of attachment should be directed by the Court of Appeal, not in the exercise of an exclusive jurisdiction, but by way of reversal of the order of the Master of the Rolls.

MOTION on behalf of the plaintiff for the attachment of the defendants, Maria McKeown, Mary McKeown, and Henry McKeown, and each of them respectively, for disobeying an order of the Court of Appeal, dated the 24th April, 1913.

By order of the Master of the Rolls, dated the 16th June, 1912, made on the hearing of a motion for an interlocutory injunction, which was by consent treated as the trial of the action, the defendants were restrained from proceeding further with the erection and completion of the permanent building complained of in the writ of summons as preventing, obstructing, and materially diminishing the light coming through the ancient windows of the dwelling-house and premises of the plaintiff. The plaintiff

appealed from this order, on the ground that it did not include a mandatory injunction commanding the defendants to pull down the building complained of. By order of the Court of Appeal, made on the 24th April, 1913, it was ordered that the order of the Master of the Rolls, dated the 16th June, 1912, should stand discharged, and in lieu thereof it was ordered that the defendants should forthwith have pulled down the permanent building complained of in the writ of summons. It was for disobedience of this order, that the writ of attachment was sought.

T. J. Campbell, for the plaintiff.

There was no appearance for the defendants.

O'CONNOR, M.R.:—

The motion for attachment is based on contempt. The contempt in this case, for which I am asked to commit the defendants, is not a contempt of this Court, but of the Court of Appeal, which made the order that has been disobeyed. In my opinion I have no jurisdiction to make the order asked for, because a Court can only punish a contempt of itself, and not that of another Court. In *Cook* v. *Cook* (1) an application was made to have a writ of attachment, which had been issued in the Probate Division, upon an order made by Pollock, B., at Chambers, and under which the respondent had been committed to Holloway Gaol, set aside on the ground of irregularity. The respondent, on whose behalf the application was made, had been ordered to pay the costs of divorce proceedings. Being without means, he had disobeyed the order; and an application had been made by the petitioner in the divorce proceedings to Pollock, B., at Chambers, to issue a writ of attachment against him for disobedienoe to the order made against him by Sir James Hannen. It was contended that the order of Pollock, B., having been made, as it had been, in a cause in the Probate Division, had been *ultra vires*, and that it ought to be set aside on the ground of want of jurisdiction. The Court (Mathew and A. L. Smith, JJ.) there held that the appeal must be allowed, and ordered the respondent to be at once discharged

(1) 2 T. L. R. 10.

M. R. 1913. FORTESCUE *v.* MCKEOWN.

from prison. In an anonymous case, reported at p. 351 in the same volume, an application was made to the Queen's Bench Division for an order of attachment against the printer and publisher of *Punch* for an alleged contempt of Court in having commented on a prosecution pending in the police court. Lord Coleridge, C.J., there said that the application was one by which the Court was asked to grant that which it in fact had no power to order. Hawkins, J., in concurring said that the application must be refused, as the Court could only punish for contempt of itself. I therefore feel obliged to refuse the application, but the plaintiff will be at liberty to make a motion to the Court of Appeal, whose order has been disobeyed.

In cases of this kind a convenient course would seem to be to apply to the Court of first instance to make up an order in the terms of the order pronounced by the Court of Appeal. On this being done, the Court of first instance would be in a position to issue a writ of attachment.

A. H. W.

Appeal. 1912. Nov. 28.

The plaintiff appealed to the Court of Appeal (1). The defendants did not appear.

T. J. Campbell, for the appellant.

A writ of attachment is the plaintiff's appropriate remedy. Order XLII, Rule 7. I submit that the Master of the Rolls had full jurisdiction to direct the issue of such a writ, and that this Court can now do so by way of reversal of his order. Alternatively, if this Court alone has power to make the order, I ask it to do so.

THE LORD CHANCELLOR :—

We are all of opinion that the Master of the Rolls had jurisdiction to make the order which the plaintiff seeks. We are dealing with the case on appeal from the Master of the Rolls,

(1) In the Court of Appeal before O'BRIEN, L.C., and HOLMES and CHERRY, L.JJ.

and as we consider that he would have rightly exercised his discretion and directed the writ to issue if he had considered that he had jurisdiction to do so, we will now reverse the order made by him, and direct that a writ of attachment do issue against each of the defendants for disobedience of the order of the 24th April, 1913.

Appeal.
1913.
FORTESCUE
v.
MCKEOWN.

Solicitor for the appellant: *Charles McMahon.*

R. ST. J. C.

WINDSCHUEGL *v.* IRISH POLISHES, LIMITED.

Barton, J.
1913.
Dec. 16.

Practice—Receiver—Duties of—Difficulty arising in execution of receivership—Application to Court.

Where a receiver is appointed by the Court in an action, and a difficulty arises in the execution of his duties, he ought, as a general rule, to submit the matter to the party having carriage, who is the proper person to bring it before the Court. The receiver should not himself bring the matter before the Court, except under special circumstances.

SUMMONS on behalf of the receiver for directions on questions arising in the execution of his duties under the following circumstances:—

The action was a debenture-holders' action brought on behalf of the plaintiff and the other debenture-holders for the realization of their security. On the 17th November, 1913, an order was made in the action on the plaintiff's application by which Mr. Jeremiah Buckley was appointed receiver and manager of the defendant company.

On the same day an order was made on a creditor's petition for the winding up of the defendant company, by which Mr. Jeremiah Buckley was appointed liquidator.

On the same day a further order was made in the debenture-holders' action directing that the plaintiff be at liberty to proceed with the same, notwithstanding the winding up. The plaintiff had carriage of the proceedings.

Barton, J. 1913.

WINDSCHUEGL *v.* IRISH POLISHES, LIMITED.

The receiver being in doubt as to whether certain proceedings should or should not be instituted against a debtor of the company, and whether under the particular circumstances of the case trading should be discontinued, issued this summons without consulting the plaintiff.

Hugh Kennedy, for the receiver.

R. G. L. Leonard, for the plaintiff :—

The receiver has no *locus standi*. It was his duty to consult the plaintiff, who has carriage of the proceedings, and the plaintiff can then take whatever steps he thinks right. We have no materials before us to form an opinion whether this application is either necessary or convenient at the present state of the proceedings. The receiver has in no sense carriage of the proceedings. He is not, strictly speaking, entitled to have a separate solicitor, except as regards matters which concern him personally, as, for example, his own remuneration, or in a proper case he may bring a summons for directions when the plaintiff has refused to do so. The practice is well settled, though there is no recently reported case in this country: *Parker* v. *Dunn* (1).

BARTON, J. :—

Mr. Leonard's objection is well founded. It is a general rule of practice that a receiver who has been appointed in an action of this kind should not make any application to the Court in his own name. The rule has exceptions, and has been departed from under special circumstances from time to time. In urgent non-contentious matters the receiver is sometimes allowed to apply to the Court at the plaintiff's request, or after the plaintiff's refusal to apply, although the plaintiff's request or refusal would not, generally speaking, justify the receiver in making a contentious application against some other party to the suit. He has no business to meddle with the rights of the parties. There may be exceptional circumstances in which the receiver is the only person who has a *locus standi* to apply in reference to some

(1) 8 Beav. 497.

matter arising out of his office, or out of his official engagements. But this is not a case of that kind. It has happened occasionally that all the parties to a suit have had some good reason for wishing the receiver to bring some matter or matters before the Court. I remember one suit in which, at the wish of all the parties, that method of proceeding was carried very far, perhaps too far. It is possible that this receiver has been misled by what occurred in that case. I am quite satisfied that this is a *bona fide* application to obtain directions; but the matter should have been submitted to the plaintiff, who has carriage of the suit. It is necessary to bear in mind what the rule of practice is. The Court discourages such applications, and sometimes visits them with costs to be paid by the receiver personally. The plaintiff will, perhaps, wish to proceed with this summons; and I adjourn it so as to enable him to look into it, and, in the meantime, I defer the consideration of the question of costs.

Solicitor for the applicant: *D. J. Deering.*
Solicitors for plaintiffs: *D. & T. FitzGerald.*

E. C. F.

MIDLETON (VISCOUNT), LANDLORD; WALLIS, TENANT (1).

Appeal.
1913.
Nov. 5, 6.

Land Law Acts—Present tenancy—Pastoral holding—Lands within an urban area—Covenant to build—Not enforced for many years—Right to have fair rent fixed.

A tenant held under a lease made in 1836, which contained a covenant to build certain houses on the land to form portion of a street of a town then in process of construction. No steps were ever taken towards the erection of the houses, and the tenant in fact used the lands as a pastoral holding in conjunction with another larger and adjoining farm. The holding was situate within an urban area.

In 1911, the tenant duly applied to have a fair rent fixed. The Sub-Commission made an order declaring that the holding should be deemed a present tenancy, and fixing a fair rent. This decision was affirmed, on appeal, by the Land Commission.

Before O'BRIEN, L.C., and HOLMES and CHERRY, L.JJ.

Appeal. 1913.

MIDLETON, *Landlord;* WALLIS, *Tenant.*

Held, that as the lands were in fact pastoral, and had always been used as such, the existence of a covenant to build, not acted on for over seventy years, did not prevent the tenancy from being a pastoral holding in respect of which a fair rent could be fixed.

Held, by Cherry, L.J., that the covenant must be presumed to have been waived by the acts of the parties, and that on this ground the tenant was entitled to succeed in a fair-rent application.

APPEAL on behalf of the landlord from an order of the Irish Land Commission declaring the lessee tenant of a present tenancy, and fixing a fair rent.

The lands in question were held under a lease dated the 11th day of April, 1836, for an unexpired term of three lives and twenty-one years after the death of the survivor, made between the Right Honourable George, Lord Viscount Midleton, of the one part, and the Reverend Doctor William Greene, clerk, of the other part. The lease contained the following covenant:—"That the said William Greene, his heirs, executors, administrators, or assigns shall erect or cause to be erected on these demised premises good and respectable dwelling-houses of three stories in height, and of the same description and in conformity with the houses already built by Mr. Mathias Callaghan on the holding which immediately adjoins these demised premises." There was also a covenant on the part of the lessee to pave and keep paved the full length or front of the demised premises to the breadth of nine feet at the least towards the street fronting the same.

The lands, which contained 4 acres, 11 perches, were situate within the urban area of the town of Midleton, in the county of Cork, and formed portion of a street called Broderick Street. It was admitted in argument, on behalf of the tenant, that the lease was made to the tenant for building purposes, and that if the holding were to be judged by reference to the lease alone, it could not be regarded as agricultural or pastoral. The lands had in fact been used for purely pastoral purposes, in conjunction with a larger adjoining holding, and nothing had been done under the covenant to build. The landlord and his agent were all along aware that the building covenant had not been carried out, and also that the lands were used for pasturage.

The tenant, on the 31st day of March, 1911, served an originating notice of an application for an order fixing a fair rent, and on the 15th day of July, 1911, the Sub-Commission made an order declaring that the lessee should be deemed a present tenant of the holding pursuant to the Land Law (Ireland) Act, 1887, and fixing a fair rent of £5 16*s*. The landlord appealed from this order to the Land Commission upon the following grounds:—(1) That the holding is not substantially either agricultural or pastoral in its character, or partly agricultural and partly pastoral; (2) that the main object of the letting of the holding was for a residence; (3) that the holding consists of a plot of land within the town and urban district of Midleton, let and taken for building purposes, and not for any agricultural or pastoral purpose; (4) that the holding is not a holding to which the Land Law (Ireland) Acts apply. In the alternative—(1) that the holding has a special value for building purposes; (2) that the rent fixed thereon by the Sub-Commission is too low, and ought to be increased.

On the 15th day of May, 1913, judgment of the Land Commission Court was delivered affirming the declaration of the Sub-Commission that the holding should be deemed a present tenancy, but increasing the fair rent to £6 16*s*. Mr. Justice Fitz Gerald, in delivering judgment, said he was of opinion that, though the holding in fact was used as a pastoral one, yet, if the covenant to build were still binding on the lessee, he did not see how it could be held that the holding was agricultural in its character because the lessee had not carried out his covenant. He was of opinion, however, that the true construction of the covenant to build was that the houses were to be erected within a reasonable time, and that such reasonable time expired more than forty years ago, and that the lessor could, on such expiration, have maintained an action for damages for breach of the covenant, and that as the lessor had not done so, he (His Lordship) must presume, on the principle laid down in *Tennent* v. *Neil* (1) and in *Gibbon* v. *Payne* (2), that before there was any breach of the covenant it was released;

(1) I. R. 5 C. L. 418. (2) 22 T. L. R. 54.

Appeal. 1913.

MIDLETON, *Landlord*; WALLIS, *Tenant.*

and that, therefore, as the object with which the tenancy commenced had disappeared, and as the tenancy had been used as a pastoral one as far back as there was any evidence, the case was not governed by the decision in *Perry* v. *Farley* (1), and a fair rent ought to be fixed.

The landlord appealed.

H. D. Conner, K.C., and *Frank J. Healy*, for the landlord:—

The obligation under the covenant to build is one that can be enforced at any time during the continuance of the term: *Perry* v. *Farley* (1). [They also cited *M'Kenna* v. *Howth* (2); *Jacob* v. *Down* (3).]

Serjeant Sullivan, K.C., and *Maurice Healy*, for the tenant:—

If no time is limited by the covenant to build, it must be assumed that a reasonable time was intended; the holding in this case has never been anything but pastoral; the covenant must be presumed to have been released. [They referred to *Gibson* v. *Doeg* (4); *Tennent* v. *Neil* (5); *Gibbon* v. *Payne* (6).]

Conner, K.C., in reply.

O'BRIEN, L.C.:—

I am of opinion that the decision of the Judicial Commissioner was right; but as he has, in his very learned and interesting judgment, laid down certain principles on which he considered he was bound, as a matter of law, to arrive at the conclusion at which he did, and as I do not think it necessary to adopt those views for the purpose of my judgment, it is right that I should state the ground upon which I base my decision.

As I understand—indeed, as is perfectly clear—the existence of a covenant in a lease providing for the erection of buildings, in every case where a large number of years elapse and the buildings have not been erected, is a most material matter to take into consideration in arriving at a conclusion of fact whether

(1) [1894] 2 I. R. 579.
(2) 43 I. L. T. R. 140.
(3) [1900] 2 Ch. 156.
(4) 2 H. & N. 615.
(5) I. R. 5 C. L. 418.
(6) 22 T L. R. 54.

the holding is agricultural or pastoral. In the present case, there is a continuous covenant to keep in repair certain houses which it was provided by a covenant in the same lease should be erected within a time not specified. Does the existence of a covenant such as that absolutely deprive a tenant of the right to have a fair rent fixed? If it did, I should at once yield to the contention put forward by Mr. Conner. But it appears to me that I am not bound to do so. It is shown by documents, coming from the custody of the landlord, that these lands were, at the date of the demise, agricultural or pastoral. It is also clear that there was in contemplation at the date of the lease an intention to convert them into something else. But, from the date of the lease down to the present time, absolutely not a single house has been erected, and the lands, in fact, have never been converted, and remain in their original condition of agricultural or pastoral lands.

At one time there was, I think, an idea that because land, which was otherwise agricultural and *prima facie* within the Act, happened to be within the ambit of a town, the tenant was thereby deprived of the right of having a fair rent fixed. That view is not accurate, and fair rents have, in fact, been fixed upon holdings that were within the ambit of a town. Unless this covenant is one which precludes the tenant from having a fair rent ever fixed, I cannot see that we are bound to hold that this land is not agricultural or pastoral land, when the parties themselves never considered it necessary to alter it in fact from its original character of agricultural land. I do not think it necessary to consider anything except the question of fact, utilizing the existence of the covenant as a material thing to be considered and weighed, and utilizing, on the other hand, all the circumstances relating to the lands and the acts of the parties. On that ground, and on that ground only, do I base my decision; and I do not think it necessary to consider the question whether there could be a release, waiver, or re-grant. I have grave doubts whether the tenant could succeed if the case had to be decided on any such principles of law. And accordingly, in order to guard myself, and to prevent it being said hereafter that the point was decided if any of these technical considerations come up before us for decision, I wish to make it clear that I do not base my judgment

Appeal. 1913. MIDLETON, *Landlord*; WALLIS, *Tenant.*

on any of the grounds put forward by the Judicial Commissioner; I neither accept nor differ from his views upon the technical considerations in the case so clearly dealt with in his decision.

HOLMES, L.J. :—

I concur in affirming the judgment of Mr. Commissioner Fitz Gerald.

There are two objections taken to that judgment. One is that though apparently these lands are agricultural and pastoral, still that, being within the ambit of a town or urban district, you cannot regard them as agricultural or pastoral. I cannot accept that proposition. Within my own experience lands that were within the limits of an urban district—lands practically within a town—have been held to be agricultural or pastoral. And in this case it is remarkable that lands in this town of Midleton, further out, but greater in area, than those under discussion here, have been held to be pastoral, and a fair rent fixed.

The other objection is one on which greater stress was laid. It is, that the lease of the lands, which was made in the year 1836, at a time when the lands were undoubtedly pastoral, shows that at that time it was the intention of the parties to convert these lands into a portion of a street in a town; and, undoubtedly, if that had been done, it would have deprived the lands of their agricultural or pastoral character. I do not offer any opinion at the present time, because it is not necessary for my decision, as to whether an action would lie for breach of covenant in failing to erect the houses. At all events that covenant seems to be evidence that at that date it was contemplated that the lands would be changed from their existing character into a different character. As a matter of fact they were not changed; for now some seventy years they have remained as they were when the lease was made, and as far as I can see they are as much agricultural and pastoral as ever they were. Are we entitled to take that matter into consideration in determining this case? I think we are. Suppose, for example, that thirty years ago, or twenty years ago, Lord Midleton, in conversation with a friend who spoke to him about the buildings not being erected on this

ground had replied—"I have long since come to the conclusion that it would do me no good to change the character of these lands," surely that would be good evidence to show that he had given up the idea of altering the character of the lands, and that they were to remain agricultural or pastoral. The evidence we have here is quite as strong as a statement of that kind, because we have the fact that for seventy years no step whatever has been taken to have any buildings erected on the lands.

Upon that basis, weighing the evidence on the one hand against the evidence on the other, I am of opinion that these lands are as much agricultural or pastoral as ever they were; and that being so, I can find nothing in the Land Acts to prevent a fair rent being fixed.

CHERRY, L.J.:—

I concur, for very much the same reasons as those which the other members of the Court have stated. But I go, perhaps, a little further than the Lord Chancellor has done, because it appears to me necessary to decide as a matter of law that the covenant in the lease is not enforceable, before a decision can be given against the landlord. Prior to 1836 the lands were clearly agricultural in character, and if there were no lease I do not think that any one could contend that they were excluded from the Land Acts. There is no doubt, also, that the lease of 1836 contemplated a change of this holding into one of an urban character. It contains a covenant providing for the erection of certain dwellings, which are required to be of the same character as other buildings then recently erected in the neighbourhood, and intended to form portion of the street that was then being constructed. There is also a covenant to pave and keep paved the full length in front of these buildings, and the intention evidently was to convert the greater part of this holding into a street of the town of Midleton. Now, if that had been done, undoubtedly the holding would have been excluded from the operation of the Land Acts as a holding not agricultural or pastoral in its character. And I go further than this, for it appears to me that if that covenant were still binding on the tenant, we should be bound to hold that the tenant

Appeal. 1913.

MIDLETON, *Landlord;* WALLIS, *Tenant.*

Cherry, L.J.

was excluded from the benefit of the Land Acts. The covenant here does not specify any particular time within which the buildings were to be erected. I think, therefore, it must mean that they were to be erected within a reasonable time; and I would find, as a matter of fact, that the buildings have not been erected within a reasonable time, because a period of seventy years has been allowed to elapse without anything being done. There is no necessity in this case to prove that the waiver or release of the covenant was in writing, because this lease was made long before the passing of the Landlord and Tenant (Ireland) Act, 1860, and the 43rd section of that Act only applies to leases made after its commencement. Therefore this covenant may be held to have been waived by the acts of the parties. In *Tennent* v. *Neil* (1) it was held that the right to recover a penal rent could be presumed to have been waived upon evidence being given of the long-continued non-observance of the covenant. *Gibbon* v. *Payne* (2), which was also cited, is very like this case. It was an action brought by the landlord on a covenant to repair, and it was held he could not succeed; there was a covenant to build and keep in repair certain stables; a long period of time had elapsed; the stables had not been built; the landlord had made no objection, and it was held he had acquiesced in the breach of covenant to repair. Upon these authorities I am prepared to hold in this case that the landlord could not now enforce the covenants which he seeks to rely upon as having transformed the character of the holding, and that these covenants must be deemed to have been waived or released. That being so, the existence of the lease does not, in my opinion, exclude the holding from the benefit of the Land Acts.

Appeal dismissed with costs.

Solicitors for landlord: *Corker & Levis.*
Solicitor for tenant: *Maurice Healy.*

J. M.

(1) I R. 5 C. L. 418. (2) 22 T. L. R. 54.

COMMISSIONERS OF MOUNTJOY SQUARE *v.* MORRIN.

M. R.
1913.
July 26.

(1913. No. 363.)

Rate — Statute — Construction — Statutory remedy not exclusive remedy— Payment of rate charged on premises enforceable by receiver or sale— Mountjoy Square Act, 1802 (42 *Geo.* 3, *c.* xxxiv).

The Mountjoy Square Act of 1802 (42 Geo. 3, c. xxxiv), s. 5, provides that each house or piece of ground specified in the schedule to the Act shall be chargeable with, liable to, and the same was thereby charged with, a yearly rate to be made by the Commissioners of the Square. Section 6 empowers the Commissioners to collect and levy such rate, and, in default of payment of any rate thereby charged upon such house or piece of ground, to enter and levy the same by distress or sale of the goods of the inhabitant, occupier, or proprietor of such house or ground.

Held, following *Commissioners of Mountjoy Square* v. *Walsh* (see note, *post*, pp. 50 *et seq.*) that the remedy of the Commissioners for enforcing payment of the rate was not limited to the statutory remedy of distress, but that they were entitled to a charge on the house of the owner enforceable by a receiver or sale.

SUMMONS.

This was an application on behalf of Sir John Barry and others, the Commissioners of Mountjoy Square, for an order that the house and premises No. 46 Mountjoy Square, in the city of Dublin, be declared well charged with the sum of £21, being the aggregate amount of rates assessed on the premises for the years 1905 to 1912, and that payment of the said sum be enforced by a sale or by a receiver, or in such manner as the Court might direct, and that all necessary inquiries be made as to whether there were any, and if any what, persons other than the defendant interested in the said premises, and that the costs of the application be provided for.

The plaintiffs were the Commissioners of Mountjoy Square, in the city of Dublin, appointed under the provisions of

M. R. 1913. COMMRS. OF MOUNTJOY SQUARE *v.* MORRIN.

42 Geo. 3, c. xxxiv, entitled an Act for enclosing and improving Mountjoy Square, in the parish of St. George, in the county of Dublin, by which Act commissioners were appointed for making, enclosing, completing, improving, and ornamenting Mountjoy Square.

Section 5 provides that all the houses and grounds surrounding the Square, as set forth in a schedule to the Act, "shall hereafter be each chargeable with and liable to, and the same are hereby charged with, such yearly rate or rates as the said Commissioners or their successors, or any five or more of them, shall from time to time by writing under their hands and seals direct and appoint; so as such yearly rates shall not exceed for any one year the sum of 5*s.* sterling for each foot running measure, and so in proportion for any number of inches less than a foot, which the fronts of the said houses and grounds contain, according to the admeasurements of them specified in the said schedule (which rates shall be paid to the said Commissioners, and their successors, and shall be raised, collected, and levied by such person or persons as the said Commissioners, and their successors, or any five or more of them, shall from time to time, by writing under their hands and seals for that purpose appoint), which rates shall be payable and paid by two equal half-yearly payments; that is to say, on the 1st day of August and 1st day of February."

Section 6 provides, "That it shall and may be lawful for the said Commissioners, or for such person or persons as by them or any five or more of them shall be authorized and appointed in manner aforesaid, to collect and levy the said rates; and on default of payment of any rate hereby charged upon any house or piece of ground to enter into and upon such house or piece of ground, and into any house to be built on any such piece of ground, and to levy the same and all arrears thereof by distress and sale of the goods of the inhabitant, occupier, or proprietor, of such houses or grounds, rendering the overplus (if any) to such inhabitant, occupier, or proprietor, after deducting thereout the sum of 1*s.* in the £ for the expense of levying the same; or where there shall not be any house or building erected or standing on the ground so in arrear, the rate chargeable on such ground shall be paid by the person entitled to the immediate

possession thereof, either as proprietor or proprietors thereof, or as deriving title under any lease made thereof, and shall be recovered by action of debt or otherwise, as the rent of the said ground is recoverable."

Section 7 provides that the rates shall be ascertained by the number of feet stated in the schedule.

The defendant Esther Morrin, wife of Peter Morrin of Baltinglass, in the county of Wicklow, was sued as owner of No. 46 Mountjoy Square, to enforce payment of rates assessed under the above Act on the house for the years 1905 to 1912. The defendant held the house under a lease for a term of 999 years, created in 1790, indemnified against head rent by other premises, 44 and 49 Mountjoy Square. William Buckley was in occupation of the house as her tenant, holding under a sub-lease for a term of 990 years, dated July 19th, 1791, subject to the rent of £26 9*s.* 10*d.* The sub-lease contained a covenant by the sub-lessee to pay the rent over and above all rates, taxes, and assessments. Frequent applications had been made to William Buckley for payment of the Square rate, but without effect. A distress warrant had been prepared and issued appointing a civil bill officer to distrain on the premises, but it was not executed, as the civil bill officer informed the solicitors for the plaintiffs that there was nothing on the premises that he could seize. Application was then made to Mr. J. P. Tyndall, who was solicitor and agent for the defendant, but with no result.

J. H. S. Russell, for the plaintiffs :—

The Mountjoy Square Act of 1802 (42 Geo. 3, c. xxxiv), sect. 5, makes the houses and grounds adjoining the Square chargeable with and charged with a rate for the maintenance of the Square. Sect. 6 authorizes the Commissioners to levy the rate by distress and sale of the goods of the inhabitant, occupier, or proprietor, of the house and ground, and, if there is no house standing on the ground charged with the rate, it is to be paid by the persons entitled to the immediate possession thereof, either as proprietor, or as deriving title under any lease, and is recoverable by action of debt. It seems to have been a *casus*

M. R. 1913.

COMMRS. OF MOUNTJOY SQUARE v. MORRIN.

omissus not to have included a house in the last provision. The late Recorder of Dublin, Sir F. Falkiner, decided that a civil bill for the amount of the rates would not lie in the case of a house. Although the Act gives a power of distress, that would be useless here. Distress is not the exclusive remedy. The amount of the rate payable by each house is a charge on the house, and can be enforced by an independent remedy, namely, like any other charge, by the appointment of a receiver or by a sale: *Scottish Widows Fund* v. *Craig* (1); *Tottenham Local Board* v. *Rowell* (2). The present case is covered by the decision of Meredith, M.R., in *The Commissioners of Mountjoy Square* v. *Walsh* (3).

Hunt, for the defendant:—

The statute prescribes a particular remedy for the recovery of the rates, and that remedy is the exclusive remedy. The statute is a taxing statute, and the words of it must be clear to impose a liability: *Murphy* v. *Lyons* (4), *per* Lefroy, C.J., at p. 24; *Reg.* v. *Mayor of Manchester* (5). The preamble of the statute recites:— "Whereas a considerable number of the inhabitants and proprietors of the several houses and grounds surrounding the Square are desirous that the same should be properly enclosed, and the inside thereof improved and ornamented in manner hereinafter mentioned at the expense of the several inhabitants of houses or proprietors of grounds surrounding the same," thus distinguishing between inhabitants of houses and proprietors of grounds. Sect. 5, which is relied on, contains nothing about raising a charge; it says merely that the houses and grounds specified "shall be each chargeable with and liable to and the same are hereby charged." The houses and grounds may be charged, but the occupier is the person liable to pay. Again, while the frontage is ascertained and fixed, there is nothing in the statute to indicate how far back from the front the charge should be operative. Grand jury cess

(1) 15 Ch. D. 378.
(2) 20 Ch. D. 208.
(3) See note, *post*, pp. 50 *et seq.*
(4) 17 Ir. C. L. R. 19.
(5) 7 E. & B. 460.

was a charge, but it was payable by the occupier and was never enforced as a charge. The marginal note to sect. 6 may be referred to, though it is not part of the statute; it is "rates how to be recovered." The section authorizes the Commissioners to levy the rates by distress and sale of the goods of the inhabitant, occupier, or proprietor of such houses or grounds, again distinguishing between inhabitant or occupier of a house, and proprietor of ground. It goes on to provide for the case of ground on which there is no house, and enacts that in that case the rate chargeable on such ground shall be paid by the person entitled to the immediate possession thereof, either as proprietor or proprietors thereof, or as deriving title under any lease made thereof, and shall be recovered by action of debt or otherwise as the rent of the said ground is recoverable. This shows that the fee is not charged except when the owner in fee is in possession. According to that the lessee under the last lease is the owner or proprietor, and he is not before the Court. In *Mountjoy Square Commissioners* v. *Walsh* (1) the defendant held under a fee-farm grant, but he had merely a yearly tenant. In *King* v. *Lord Ardilaun* (2), a case of grand jury cess, Sir Andrew Porter, M.R., held that the Court had no power to order a sale of the premises on which the grand jury cess is a "charge" under sect. 153 of 6 & 7 Wm. 4, c. 166, for payment of the arrears thereof. He adopted the argument that as the grand jury cess was a new liability, depending wholly upon a taxing statute, which statute prescribed the mode or modes of enforcing it, such modes were exclusive. *Tottenham Local Board* v. *Rowell* (3) was a proceeding against an owner to enforce an express statutory charge created by the Public Health Act. *Scottish Widows Fund* v. *Craig* (4) was the case of a terminable rentcharge charged by an order of Enclosure Commissioners upon the inheritance of glebe lands under the provisions of a drainage company's Act. Here the owner of the inheritance is not before the Court.

(1) See note, *post*, pp. 50 *et seq.*
(2) [1894] 1 I. R. 48.
(3) 20 Ch. D. 208.
(4) 15 Ch. D. 378.

M. R. 1913.

COMMRS. OF MOUNTJOY SQUARE v. MORRIN.

Russell, in reply :—

The word "charged" is repeated in the schedule. The words are—"The schedule of the several houses and grounds around Mountjoy Square charged with the rate by this Act granted." In *West Ham Corporation* v. *Sharp* (1) it was held that an urban authority might bring an action in the county court for a declaration that the plaintiff was entitled under the Private Streets Works Act, 1892, to a charge on premises for the apportioned expense incurred by the plaintiffs in executing works under the Act, and payable by the defendant in respect of the premises, and for an order that the premises be sold, and for the appointment of a receiver, although the Act gave the urban authority the remedies under the Conveyancing and Law of Property Act, 1881, and otherwise, as if they were mortgagees having powers of sale and of appointing a receiver. The Act in question there provided that the premises should stand and remain charged with the apportioned sums.

O'CONNOR, M.R. :—

Undoubtedly the defendant is the proprietor of the house, as she has property in it, and holds it for a long term of years. Section 5 provides that all the houses and grounds on each side of the Square, as set forth in the schedule thereunto annexed, "shall hereafter be each chargeable with and liable to, and the same are hereby charged with such yearly rate or rates as the said Commissioners and their successors, or any five or more of them, shall from time to time by writing under their hands and seals direct and appoint, so as such yearly rates shall not exceed for any one year the sum of five shillings for each foot running measure." Taking that section by itself it undoubtedly charges the houses, and every estate and interest therein, with the rate authorized by the Act and assessed under it. It does not throw the charge upon any particular interest, but upon the houses themselves, and every interest carved out of them, from the fee-simple down. On this

(1) [1907] 1 K. B. 445.

section I must hold that the estate and interest of the defendant, which is an interest in a term of 999 years, is subject to the charge.

The question remains, are the Commissioners entitled to the ordinary remedy incident to the ownership of a charge, namely, recovery of the amount due by a sale of, or by the appointment of a receiver over, the premises the subject of the charge? The argument on behalf of the defendant is that a special remedy has been given by section 6 of the Act, namely, by distress and sale. That may be a very efficient remedy in the cases of houses which are occupied and contain goods which may be seized; but in the case of houses which are unoccupied, or contain no goods, that remedy would be quite useless. Notwithstanding that, Mr. Hunt argued that, although that remedy might be ineffective, there is no other remedy; and in support of that argument he referred to what Sir Andrew Porter said in *King* v. *Ardilaun* (1), at p. 53. He says:—"Mr. Roche very forcibly argued that as the grand jury cess is a new liability, depending wholly upon a taxing statute, which statute prescribes the mode or modes for enforcing it, such modes are exclusive. I think that this argument is right, and that I cannot order a sale of the lands." I should be very perplexed owing to that opinion, but that I have the judgment of my immediate predecessor in this Court in the case of *The Mountjoy Square Commissioners* v. *Walsh* (2), decided in the year 1909 on the words of this statute, which case I cannot differentiate from the present. The defendant there, Loftus Walsh, was the proprietor of a house in Mountjoy Square held under a fee-farm grant. The rates fell into arrear, and the Commissioners pursued the same course which they have taken here. The Master of the Rolls there says—"The defendant is owner in fee under a fee-farm grant. Whether he is owner of the entire fee-simple is not material to this question." I gather that he held that, as the charge was on the house, it was a charge on every estate and interest in it. He goes on—"The words of the Mountjoy Square Act, 'shall be chargeable with and liable to, and the same are hereby charged,' compel me to hold that it creates a charge in favour of the Com-

(1) [1894] 1 I. R. 48.

(2) See note, *post*, pp. 50 *et seq.*

M. R. 1913. COMMRS. OF MOUNTJOY SQUARE *v.* MORRIN.

missioners, and in addition to the usual remedies gives them a right of distress; and I, as a Judge of a court of equity, am bound to enforce this charge." I cannot go behind that, and must hold that the plaintiffs are entitled to a charge on the premises, and to have their charge enforced by a sale or a receiver.

The following order was made:—

> The Judge doth declare that the assessment of 2*s.* 6*d.* per running foot for the years 1905, 1906, 1907, 1908, 1909, 1910, 1911, and 1912, amounting to the sum of £21, is a charge on the interest of the defendant in the house and premises No. 46 Mountjoy Square, and is enforceable in equity by the appointment of a receiver over or a sale of said house and premises; and it is ordered that the defendant do pay to the plaintiffs their costs of said application when taxed and ascertained, and any of the parties are to be at liberty to apply to the Judge as they may be advised, and the Judge doth order that the issuing of the order be stayed for the period of one month from the date hereof.

Solicitor for the plaintiffs: *William V. Seddall.*
Solicitor for the defendant: *Joseph P. Tyndall.*

W. L.

NOTE.

26th January, 1909. Before MEREDITH, M.R.

COMMISSIONERS OF MOUNTJOY SQUARE *v.* WALSH.

(1908. No. 1011.)

ADJOURNED SUMMONS.

This was an application on behalf of Sir John E. Barry and twelve others, being Commissioners of Mountjoy Square, appointed under the provisions of the Act, 42 Geo. 3, c. xxxiv, for an order that the houses and premises Nos. 62 and 66 Mountjoy Square, in the City of Dublin, be declared well charged with the following rates, viz.:—No. 62—£12 10*s.*, being the aggregate amount of rates assessed on the said premises for the years 1904, 1905, 1906, and 1907; No. 66—£12 15*s.*, being the aggregate amount of rates assessed on the said premises for the years 1904, 1905, 1906, and 1907, and that payment of the said rates be enforced by a sale, or by a receiver, or in such a manner as the Court may direct, and that all necessary inquiries be made as to whether there are any, and, if any, what, persons other than the defendant Loftus Walsh interested in the premises, and that the costs of the application be provided for.

It appeared from the defendant's affidavit that he held No. 62 Mountjoy Square under a fee-farm grant made pursuant to the Renewable Leasehold Conversion Act, but that he had parted with his interest in No. 66 prior to the commencement of the present proceedings.

It appeared from the affidavits made in support of the summons that assessments had been made in the years 1904, 1905, 1906, and 1907, by the Commissioners, at the rate of 2*s.* 6*d.* per running foot on the houses and grounds surrounding the Square, including Nos. 62 and 66, and that there was due in respect of No. 62 £12 10*s.*, and in respect of No. 66 £12 15*s.*; that repeated applications had been made to the defendant and his tenants for payment, but that payment had been refused.

It appeared that a civil bill had been brought against the defendant in the Recorder's Court, for Square rates, including those for 1904, being portion of the rates claimed in respect of No. 62, and that the Recorder dismissed the civil bill, but this was explained by the fact that the remedy by civil bill given by sect. 6 of the Act was confined to the case where no house had been built on the ground.

S. L. Brown, K.C., and *Bartley*, for the plaintiffs:—

The statute charges the rates on the houses, and the charge can be enforced by appointment of a receiver or by a sale. The remedy by distress given by the statute is not the exclusive remedy, and is not applicable in the present case. [The following authorities were referred to: *Tottenham Local Board of Health* v. *Rowell* (1); *Scottish Widows Fund* v. *Craig* (2); *Hornsey District Council* v. *Smith* (3); *West Ham Corporation* v. *Sharp* (4).]

Jefferson, K.C., and *Hunt*, for the defendant:—

The principle that where a statute prescribes a particular remedy no other can be resorted to applies: *Underhill* v. *Ellicombe* (5); *Weale* v. *West Middlesex Water Co.* (6); *Vallance* v. *Falle* (7); *Bailey* v. *Bailey* (8); *West* v. *Downman* (9); *Passmore* v. *Oswaldthistlethwaite Urban Council* (10); *Re McDonnell*, reported in Foot's Grand Jury Laws, p. 130, in note to 6 & 7 Will. 4, c. 116, s. 153, a case before Sir Colman O'Loghlen, Chairman of the County of Mayo, at Westport Sessions, December 31st, 1860. In *In re Sidney's Estate* (11) before Dobbs, J., there was a claim for compensation by a purchaser in the Landed Estates Court in respect of an annual charge, payable under the Rutland Square Act (21 Geo. 3, c. 43), and it was held that the annual

(1) 15 Ch. D. 378.
(2) 20 Ch. D. 208.
(3) [1897] 1 Ch. 843.
(4) [1907] 1 K. B. 445.
(5) 1 McL. & Yo. 455.
(6) 1 Jac. & W. 371.
(7) 13 Q. B. D. 109.
(8) *Ib.* 859.
(9) 14 Ch. D. 111.
(10) [1898] A. C. 387.
(11) I. R. 1 Eq. 343.

M. R. 1909

COMMRS. OF MOUNTJOY SQUARE v. WALSH.

payment was not a charge but a tax, of which the purchaser ought to have made himself aware, and that he was not entitled to compensation in respect of it (1).

Bartley, in reply :—

By sect. 20 of the Rutland Square Act the houses are not charged, but only "chargeable and liable to the annual payment of 1*s.* 9*d.* for each foot," and by sect. 28 a power of distress and sale is given in default of payment.

Jan. 26.

MEREDITH, M.R. :—

The question as to the validity of the rates is not open, not having been raised by affidavit, but I am of opinion that the statute is incorporated in the assessment, and that the rate is valid. The really important question upon which a decision is sought by the Commissioners is open for decision. I hold that the defendant is not liable in respect of No. 66 Mountjoy Square. As to No. 62, the question is, can the Commissioners enforce payment of the rates by proceedings in a court of equity? The defendant is owner in fee under a fee-farm grant. Whether he is owner of the entire fee-simple is not material to this question. The case before Sir Colman O'Loghlen (2) is not an authority in favour of the defendant, but rather against him. The case before Judge Dobbs (3) is not applicable. The words of the Mountjoy Square Act, "shall be chargeable with and liable to, and the same are hereby charged," compel me to hold that it creates a charge in favour of the Commissioners, and in addition to the usual remedies gives them a right of distress, and I, as a Judge of a court of equity, am bound to enforce this charge. The Commissioners were bound to take the step they have taken in order to have their rights determined. The judgment of Hall, V.-C., in *Scottish Widows Fund* v. *Craig* (4), shows that the existence of a power of distress and entry does not prevent a corporation from being entitled to the ordinary remedy which a private individual has of enforcing a charge by sale or mortgage. The charge is one which can be enforced in equity by a receiver, mortgage, or sale, and I shall declare accordingly, and give liberty to apply. If an application is made for a receiver, it must be shown that there is a difficulty about making a distress. I shall make no order as to costs. Mr. Walsh is not liable as to No. 66, and he has been named as a defendant by the Commissioners in order to obtain a decision on the construction of an Act of Parliament, which is the Commissioners' charter, and they are in the position of trustees who have to come to Court to have their trust deed construed.

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(1) They also attempted to question the validity of the rates, but the Master of the Rolls held that that question was not open. [REP.]

(2) *Re McDonnell*, Foot's Grand Jury Laws, p. 130. Note to s. 153 of Grand Jury Act, 1836.

(3) *In re Sidney's Estate*, 1. R. 1 Eq. 343.

(4) 20 Ch. D. 214.

M. R. 1909.

COMMRS. OF MOUNTJOY SQUARE v. WALSH.

The order was as follows:—"The Court doth declare that the assessment of 2*s.* 6*d.* per running foot, made by the plaintiffs, is a charge on the interest of the defendant in the house and premises No. 62 Mountjoy Square, and is enforceable in equity by the appointment of a receiver over, or sale of, the said house and premises; either of the parties to be at liberty to apply to the Court as they may be advised.

Solicitor for the plaintiffs: *W. V. Seddall.*
Solicitors for the defendant: *Thomas Franks & Son.*

W. L.

MICHAEL SMYTH *v.* MYLES BYRNE AND ELIZABETH C. BYRNE (1).

Appeal. 1913. Nov. 18.

Lunatic—Entry on lands of—Bailiff—New letting—Constructive trust—Graft.

The doctrine applicable to entry on the lands of a minor applies also to entry on the lands of a lunatic. A person entering on the lands of a lunatic, with notice of the lunacy and of the rights of the lunatic, becomes a bailiff in respect of the lunatic's estate in the lands, and where the lands are held by the lunatic under a contract of tenancy, and a new letting is subsequently made to the person so entering, such new letting will be deemed a graft on the old tenancy.

Farrell v. *Maher* (42 I. L. T. R. 156) not followed.

CASE STATED by the Right Honourable Mr. Justice Ross on the hearing of an appeal under the 43rd section of the County Officers and Courts (Ireland) Act, 1877, as follows:—

The equity civil bill in this case was brought by Michael Smyth, of Portrane, in the Co. of Dublin, farmer, a person of unsound mind, not so found by inquisition, by Sir Augustine F. Baker, his next friend, against the defendants, Myles Byrne, farmer, and Elizabeth C. Byrne, his wife, and claimed a declaration that the plaintiff was entitled to possession of a certain farm of land, and that the defendants held the same as trustees for the plaintiff.

The following facts, which appear from the documents read before the County Court Judge, set out in the Registrar's note of

(1) Before O'BRIEN, L.C., and HOLMES and CHERRY, L.JJ.

Appeal. 1913. SMYTH v. BYRNE.

the oral evidence given before the County Court Judge, embodied in the Judge's note, and which are incorporated with this case, were proved or admitted before me:—

1. Thomas Smyth, sometimes called Smith, late of Mullicagh, in the Co. of Wicklow, farmer, was, at the respective dates of his will and death, absolutely entitled at law and in equity as tenant from year to year to the tenant's interest in the farm of land known as part of the lands of Mullicagh Lower, with the house and offices thereon, containing 38A. 3R. 6P. statute measure, situate in the parish of Hollywood, barony of Lower Talbotstown, and Co. of Wicklow, subject to the payment of the yearly rent of £17 17*s.* 6*d.*

2. The said Thomas Smyth made his will, dated the 4th day of July, 1899, and thereby bequeathed his interest in the said farm, together with all his other property, to the plaintiff, subject to the right of his, the testator's, wife to remain on the farm, and to be supported and maintained there, or, at her option, to receive the sum of £100 in lieu of such rights of residence, support, and maintenance; and subject to the liability to support and maintain the testator's three children, Edward, James, and Mary Jane, so long as they should wish to stay, and should they desire to leave the farm when old enough to support themselves, then to put them to some business, or give them some little pecuniary assistance to enable them to earn their living.

3. The said Thomas Smyth died on the 10th day of July, 1899, and probate of his said will was, on the 28th August, 1899, duly granted to Thomas Reilly and Patrick Cunningham, the executors therein named.

4. The said Thomas Reilly and Patrick Cunningham assented to the bequest of the said farm to the plaintiff, and he entered into possession thereof, and paid the rent therefor, and worked and farmed the same.

5. In or about the month of September, 1903, the plaintiff was certified to be of unsound mind, and became an inmate of the Richmond Lunatic Asylum, from which he was afterwards removed to Portrane Asylum, where he now resides. Down to the time he was so certified he always lived on the said farm, and was in receipt of the profits thereof.

6. Shortly after the plaintiff was certified to be of unsound mind, the defendant Elizabeth C. Byrne, who was then a spinster, came to live on the farm, and took over the working and management thereof.

7. The rent of the farm, after the departure of the plaintiff, fell into arrear, and on the 10th October, 1906, a decree for possession was granted by the County Court Judge to the landlord, and the usual notice under section 7 of the Land Law (Ireland) Act, 1887, was served on the 18th of January, 1907.

8. On the 3rd May, 1907, before the expiration of the period for redemption, or the resumption of possession by the landlord, an agreement was entered into between the defendant Elizabeth C. Byrne and her brothers other than the plaintiff, and her sister, all of whom were then residing on the farm, that the said defendant should become the tenant of the farm, and should make certain payments to the other parties, wholly disregarding the plaintiff and his rights.

9. In pursuance of the said agreement the defendant Elizabeth C. Byrne was accepted as tenant by the landlord, possession having been formally resumed, and in the following year agreed to purchase the fee-simple of the holding under the Irish Land Act, 1903. No notice of the ejectment proceedings, or of the agreement with the landlord, was given to the plaintiff, or to the persons under whose care he now is, or was, at the dates aforesaid.

10. Subsequent to the said agreement, the defendant Elizabeth C. Byrne intermarried with defendant Myles Byrne.

11. By an indenture dated the 8th day of July, 1910, and made between the said Elizabeth C. Byrne of the one part, and the said Myles Byrne of the other part, the said Elizabeth C. Byrne assigned the said farm and the benefit of the said purchase agreement to the said Myles Byrne absolutely, subject to the payment of the sums previously agreed to be paid by the said Elizabeth C. Byrne to her brothers and sister.

12. The name of the said Myles Byrne, as purchaser, was afterwards substituted for that of his wife, the said Elizabeth C Byrne, and the said defendants are now in possession of the farm, and claim to hold the same for their own benefit.

Appeal. 1913. SMYTH v. BYRNE.

13. The said Myles Byrne had full notice, or should be deemed to have had full notice, at and prior to the date of the said assignment, of the rights of the plaintiff, and of the provisions of the said will, and of the mental condition of the plaintiff.

14. The widow of the late Thomas Smyth died many years ago. The said James Smyth and Mary Jane Smyth have ceased to reside on the farm, but the said Edward Smyth still resides there. The plaintiff is, and always has been, ready and willing to give to the said Edward Smyth, James Smyth, and Mary Jane Smyth, the benefits to which they are entitled under their father's will.

Counsel on behalf of the plaintiff submitted that, by reason of the lunacy of the plaintiff, the defendant Elizabeth C. Byrne occupied a fiduciary position to the plaintiff, and that the new letting referred to in paragraph 9 was a graft upon the former interest of the plaintiff.

I considered myself bound by the decision of Gibson, J., in *Farrell* v. *Maher* (1), but, at the request of counsel for the plaintiff, agreed to state a case for the opinion of the Court of Appeal.

The questions for the opinion of the Court of Appeal are:— (1) Was there any fiduciary relationship between the plaintiff and the defendant Elizabeth C. Byrne as regards the said farm of lands prior to the ejectment proceedings and new letting mentioned in paragraphs 7 and 9, and did such relationship continue as between the plaintiff and both defendants subsequent to the marriage of the defendants, and the assignment of the 8th day of July, 1910? (2) Was the said new letting a graft upon the former tenancy of the plaintiff?

S. L. Brown, K.C., and *Grove White*, for the plaintiff:—

When the defendant Elizabeth C. Byrne entered upon the plaintiff's lands, with knowledge of the lunacy, she became a bailiff for the plaintiff. She occupied a special position towards the plaintiff, and owed, by virtue of that position, a duty towards him: see judgment of Romer, L.J., in *In re Biss*; *Biss* v. *Biss* (2).

(1) 42 I. L. T. R. 156. (2) [1903] 2 Ch. 40, at p. 61.

Had the plaintiff been a minor, it is clear that this would have been so: *Quinton* v. *Frith* (1). There is no difference in principle between the taking possession of a minor's lands and the taking possession of those of a lunatic; each is powerless either to defend his rights, or to assent to what is done. Gibson, J., in *Farrell* v. *Maher* (2) held otherwise, but that decision is not binding on this Court, and ought not to be followed. Once it is established that the sister was a bailiff for the plaintiff, it follows that the new tenancy and the interest acquired under the purchase-agreement were a graft upon the plaintiff's former interest in the lands: *Keech* v. *Sandford* (3); *In re Biss*; *Biss* v. *Biss* (4).

Carrigan, K.C., for the defendants:—

I rely upon *Farrell* v. *Maher* (2). The principle under which a person entering upon the lands of an infant will, under certain circumstances, be deemed in equity a bailiff for the infant, has never been extended to the case of a lunatic. The alleged analogy between the two cases fails; an infant is helpless, but a lunatic may recover at any time. The principle relied on by the plaintiff has descended from the feudal law. The Vice-Chancellor in *Quinton* v. *Frith* (1) has traced it back to Co. Lit. 90 *a*. That principle is quite inappropriate to modern land tenure in Ireland. The interest of the landlord must be considered: *Dempsey* v. *Ward* (5). It would be unfair to saddle him with a lunatic tenant. The case finds that the old tenancy was duly determined, possession given to the landlord, and a new letting made, followed by the sale. The landlord would never have sold to the plaintiff. It would be an extension of the doctrine of graft to apply it in such circumstances. [The following cases were also referred to:— *Howard* v. *Earl of Shrewsbury* (6); *Maguire and M'Clelland's Contract* (7).]

(1) 1 R. 2 Eq. 396.
(2) 42 I. L. T. R. 156.
(3) 2 Wh. & Tu. L. C., 8th ed., p. 706.
(4) [1903] 2 Ch. 40.
(5) [1899] 1 I. R. 463.
(6) L. R. 17 Eq. 378.
(7) [1907] 1 I. R. 393.

Appeal. 1913.

SMYTH v. BYRNE.

O'BRIEN, L.C. :—

This case lies within the narrowest possible limits; admittedly there is no authority governing it; it comes before us as one of first impression, and, speaking for myself, I do not think that any postponement of my judgment would be of practical advantage.

The claim of the appellant is that the sister of the lunatic, who entered upon his lands with knowledge of the lunacy, became a bailiff in respect of the lunatic's estate in the lands.

Now if this was the case of a helpless minor three or four years of age, Mr. Carrigan admits that the sister would have been a bailiff for the minor, and that, applying the doctrine of graft, the ownership of the property would now be vested in the minor.

It has been suggested that the doctrine which protects the property of minors rests on some abstruse principle of feudal law, but after careful consideration of the views put forward by Mr. Carrigan, I do not think that is so; we find it settled in English law—and a very proper law it is—that if, under certain circumstances, a person enters upon a minor's property, he becomes clothed with such a fiduciary relationship towards the minor that he cannot acquire the minor's estate for his own benefit. As I have said, this would be such a case admittedly if the owner of the property had been a minor. A minor cannot acquiesce in, or assent to, what is done, and at this present day (the doctrine having been extended to all sorts of property unknown to the feudal law) we must take the basis of it to be that the minor is helpless, and, being helpless, cannot assent.

That being so, it is impossible, on any principle, to distinguish between the case of a minor and that of a lunatic. The condition of a lunatic is even more helpless than that of a minor, and, speaking from my own experience during the short time I have sat as Chancellor, it would seem to me very expedient to extend the doctrine I have mentioned to the case of a lunatic's estate. It is an easy matter when a man becomes of unsound mind that he should be sent to an asylum without knowledge of those who are entrusted with the care of lunatics and their estates under the King's sign-manual; and once he is there, his property, equally without such knowledge, may be taken possession of by relatives or strangers.

There being no authority on this question, we are free to deal with it as we think right on principle, and, speaking for myself, I have no doubt that the same principle ought to apply in the case of a lunatic's estate as in that of a minor; and, as it is admitted that if this were the case of a minor the doctrine I have mentioned would apply, this appeal must be allowed.

HOLMES, L.J.:—

This appeal turns on a simple question of law. A lunatic, being tenant of lands, was removed therefrom to an asylum, and afterwards his sister came to live thereon. While she was there the lunatic's tenancy was determined, and the sister, being aware of the lunacy, obtained a new letting from the landlord. The question is whether or not this was a graft upon the old tenancy. It has been long settled by the highest authority that, in similar circumstances, when the owner of the former interest was a minor, the new tenancy must be considered a graft upon the old one; and I cannot account for these decisions except upon the ground of the helplessness of the minor and his incapacity to defend his rights. It seems to me the same principle applies to the case of lunatics. There is no authority upon the subject one way or the other, except the judgment of Mr. Justice Gibson, to which we have been referred, and which, although we owe it every respect, is not binding upon this Court. That decision was binding upon Mr. Justice Ross; and the present case was stated by him to enable this Court to lay down some rule on the subject. I agree with the Lord Chancellor that the appeal ought to be allowed.

CHERRY, L.J.:—

I concur. Were it not for the decision of Mr. Justice Gibson in *Farrell* v. *Maher* (1), I would think the case free from doubt. There are a number of cases going back for a long period of time which decide that a person entering on the lands of a minor, with

(1) 42 I. L. T. R. 156.

Appeal. 1913. SMYTH v. BYRNE.

knowledge of the minor's rights, is in the position of a bailiff or trustee for the minor, and can obtain no benefit for himself personally by the occupation of the lands. I think that the same principle must apply in the case of lunatics, who require the protection of courts of equity quite as much as infants do. Both questions should be answered in the affirmative.

Solicitors for the plaintiff: *Baker, Ringwood, & Gordon.*
Solicitor for the defendants: *Daniel P. Blayney.*

R. ST. J. C.

Ross, J. 1913.

TUITE *v.* CULLEN. REILLY *v.* SAME.

Nov. 10, 13. *County Court—Costs—Equity Civil Bill—Suit relating to lands—"Subject-matter"—County Court Rules—Costs in Equity suits—Higher scale.*

In an equity civil bill to enforce payment of a mortgage by sale of the lands subject thereto, the plaintiff is entitled, unless the Judge orders to the contrary, to have his costs taxed on the higher scale if the value of the lands exceeds £200, although the mortgage debt is under £200.

APPEAL from an order made by the County Court Judge of Cavan.

Two equity civil bills were brought by the plaintiffs Tuite and Reilly to raise the amount of two judgment mortgages charged on the defendant's farm of land at Clonkeefy, county Cavan. By order of the County Court Judge, dated 4th October, 1912, the suits were consolidated, and both mortgages were declared well charged on the said lands. The plaintiffs were declared entitled to their costs in the same priority as their respective demands, and the costs were ordered to be taxed by the Clerk of the Crown and Peace, or by the Registrar, and the defendant was ordered to pay to the plaintiffs the amounts due to them for principal, interest, and costs, within three months of the date of said order, and in default of his doing so the lands were directed to be sold.

In the suit in which Tuite was plaintiff the claim was for £72 19*s.* for principal, and £6 10*s.* 3*d.* for interest, together with

£3 18*s.* 1*d.* for costs of registering the judgment as a mortgage, making altogether the sum of £83 7*s.* 4*d.*

In the suit in which Reilly was plaintiff the claim was for £118 3*s.* 4*d.* for principal, and £9 14*s.* 10*d.* for interest, with £3 18*s.* 1*d.* for costs of registering the judgment as a mortgage, making altogether the sum of £131 16*s.* 3*d.*

The annual value of the lands did not exceed £30.

Shortly after the expiration of the period of three months, but before the plaintiffs' costs were taxed, the defendant's farm was sold out of Court for the sum of £610. The costs came on for taxation before the registrar. On the taxation the plaintiff's solicitor contended that, the lands having been sold for £610, the costs should be taxed on the higher scale. Defendant's solicitor contended they should be taxed on the lower scale, being the scale applicable where the subject-matter of the suit does not exceed £200, and that in these cases the subject-matter was the mortgage debt. The registrar held with the contention of the defendant's solicitor, and taxed the costs on the lower scale; and the County Court Judge, on the construction of the rules, affirmed the decision of the registrar.

The plaintiffs appealed to the Lord Chancellor, by whom the appeal was assigned to Mr. Justice Ross; and it now came on for hearing before him.

Denis Henry, K.C., and *J. W. Bird*, for the plaintiffs:—

Dudley White, K.C., and *H. E. Kennedy*, for the defendant:—

The County Court rules and schedules of taxation referred to in the arguments appear in the judgment of Ross, J. The following cases were cited:—*M'Donnell* v. *M'Mahon* (1); *Studham* v. *Stanbridge* (2).

Cur. adv. vult.

Nov. 13.

Ross, J.:—

This is an appeal from the order of the County Court Judge of Cavan. It involves the question whether the costs of the equity civil bill should be taxed on the higher or the lower scale. The registrar held that they should be taxed on the lower scale, and this

(1) 23 L. R. Ir. 283. (2) [1895] 1 Q. B. 870.

Ross, J. 1913. TUITE v. CULLEN.

decision was confirmed by the County Court Judge in the order appealed from.

The Judge has the same discretion in respect of the costs of an equity civil bill as a Judge of the Chancery Division. If the learned Judge had exercised that discretion, no appeal would lie. It is plain from his note that he exercised no discretion, but decided the matter on the construction of the words used in the Act and rules, and from that judgment an appeal lies.

In the first equity civil bill the claim was for the realization of a judgment mortgage of £72. In the second, which was consolidated with the first, the claim was on foot of a mortgage for £118. The sale of the lands, which took place out of Court, realized £610. If the subject-matter of the suit is the mortgage debt, the decision of the Court below is right; if the subject-matter is the purchase-money of the farm, the decision is wrong.

By sect. 33 of the County Officers and Courts Act of 1877, the Civil-bill Court is empowered to exercise all the power and authority of the High Court of Chancery in various suits and matters, including all suits for enforcing any mortgage or charge upon lands where the mortgage or charge shall not exceed in amount £500, and the annual value of the lands to which the suit relates shall not exceed £30.

We now turn to the order dealing with costs, and we find the following:—

I. In suits and proceedings relating to personalty, and in suits and proceedings relating to lands, where the value of the personalty or the value of the lands shall not exceed £200, there shall be paid to counsel and solicitors the fees, costs, and charges set forth in the column headed "Lower Scale."

II. In all suits and proceedings under any of the provisions of the County Officers and Courts (Ireland) Act, 1877, Part II, other than those above provided for, there shall be paid the costs set forth in the column headed "Higher Scale."

V. The value of the subject-matter of any suit, for the purpose of stamp duties and for the allowance of fees, costs, charges, and expenses, shall in case of dispute be assessed by the Judge.

X. As to all fees and allowances which are discretionary, the officers on taxation shall take into consideration the amount or value of the subject of litigation.

In the schedule headed "Counsel's Fees" we find that when the subject-matter of the suit shall exceed in value £50, but shall be under the value of £200, a sum of £1 1*s.* is to be allowed on the lower scale, and when such value shall be above £200, a sum of £2 2*s.* on the higher scale, for advising proceedings or defence, settling the equity civil bill, or petition and directing proofs.

In the schedule headed "Solicitors' Costs and Charges" we find the Judge has power to allow a percentage or commission in lieu of costs, subject, *inter alia*, to the following provisions:—

The percentage or commission in any such suit shall be calculated upon the value of the subject-matter of such suit, and shall not exceed £5 on such value.

Under the head of "Stamps," Part III, we find: "In all cases in which the subject-matter of the suit shall not exceed in value the sums set out in the following scale—1*s.* on the civil bill, and 1*s.* on the final decree, where the subject-matter does not exceed £50," and so on. Thus we find that, whatever is meant by "proceedings relating to personalty" or "relating to lands" is translated in the rules by the expression "subject-matter of the suit" or "subject of litigation."

What, then, is the subject-matter of the suit, or the subject of litigation, in an equity civil bill for the realization of a mortgage?

We turn now to the forms in ordinary use in the County Courts. We find cases where the amount of the charge is ascertained, and cases in which it is not ascertained. In the latter case, such as where the plaintiff is a bank claiming as equitable mortgagee on foot of a deposit of title-deeds, the amount of the charge is not known, and part of the claim must be that an amount be taken. In the case of a judgment mortgage the claim is—(1) for a declaration that the judgment mortgage is well charged on defendant's interest in the lands; (2) payment of the debt and costs; (3) that such payment be enforced by a sale of the lands or by a receiver, or both, as the Court may direct.

Ross, J.
1913.
TUITE
v.
CULLEN.

Now, although part of the claim is for an order that the defendant do pay, and although a period is usually given for payment before the sale of the lands is decreed, the suit is not of the nature of a personal action. The gist of the suit is, that the debt may be put on the lands by way of charge, and the charge realized out of the lands. When the lands are sold, the Court is bound to distribute the purchase-money according to law. It must ascertain the priorities of the incumbrances *inter se*, and distribute the purchase-money in accordance with the rights of the various persons having an interest in the lands.

The subject of litigation or the subject-matter of the suit must be something having a money value or capable of having a money value. It may be the mortgage debt, the claim; or it may be the lands or property by the sale whereof the claim is to be satisfied. It cannot be both in the aggregate.

It need not necessarily be something the value of which is known at the commencement of the proceedings, because, as we have seen, in the case of a bank suing as equitable mortgagee, the amount of the mortgage debt must be a subject of inquiry. The subject-matter would appear to be some one thing the value of which is to be the test as to the scale of costs.

If the subject-matter is the claim, in all representative suits there would be more than one subject-matter. I am of opinion that the subject-matter means the material which is to be operated upon by the Judge's decree for the purpose of satisfying the plaintiff's claim in the suit. That can only mean in this case the lands.

In an administration suit it would be absurd to say that the creditor's demand is the subject-matter of the suit, or the subject of litigation. Plainly the assets constitute the subject-matter of the suit.

This view is not merely technically right, but is in accordance with common sense. The proof of the plaintiff's claim is not usually a matter of much trouble; but the realization of the property out of which that claim and the claims of other chargeants must be satisfied is, in the ordinary course, a troublesome and expensive proceeding.

If the value of the subject-matter is not known at the

commencement of the suit, it can be assessed by the Judge at any time under Rule 5. I do not think the cases cited have much bearing on the exact point I have before me. I reverse the order appealed from, and remit the case to the registrar with a direction to tax the costs on the higher scale.

I am prepared to state a case for the opinion of the Court of Appeal if requested to do so (1).

Solicitors for the plaintiffs: *Cochrane & Co.*
Solicitor for the defendant: *James J. Lynch.*

D. M. S.

IN THE MATTER OF THE LIMERICK (No. 1) RURAL DISTRICT COUNCIL.

Labourers (Ireland) Acts—Lands held under fee-farm grant compulsorily acquired by district council—Compensation under £60—Prima facie *evidence of title given by grantee—Receipt given by grantee—Right of district council to be registered in local register of title as absolute owners in fee-simple free from the fee-farm rent—Right of owner of rent to apply to county court for relief—Right of such owner to compensation out of insurance fund—Labourers (Ireland) Act,* 1906 (6 *Edw.* 7, *c.* 37), *s.* 11, *sub-ss.* 1, 4, 6; *s.* 21—*Local Registration of Title (Ireland) Act,* 1891 (54 *& 55 Vict. c.* 66), *ss.* 92, 93.

A rural district council acquired compulsorily under the Labourers Acts a plot of land which was held under a fee-farm grant, and was, with other lands, subject to a fee-farm rent, created by a fee-farm grant made in the year 1771. B. was tenant for life of the lands subject to the fee-farm rent, and had given to the district council *prima facie* evidence that she was a person having power to sell under the Land Purchase Acts, and had satisfied them that for six years previously she had been in possession. The sum of £8 16*s.* was awarded as compensation to B., and was duly paid to her, and she gave the district council a receipt in the form prescribed by the Labourers (Ireland) Order, 1906, in pursuance of sect. 11, sub-s. 4, of the Labourers (Ireland) Act, 1906. No compensation was awarded by the arbitrator to the owner of the rent reserved by the fee-farm grant, nor was any release or receipt executed by him. On an application under the Local Registration of Title (Ireland) Act, 1891, by the district council, for first registration,

(1) Counsel for the defendant subsequently informed the Court that they did not require a case to be stated. [REP.]

Madden, J. 1913.

In re Limerick (No. 1) Rural District Council.

Held, that the effect of the receipt was to vest absolutely in the district council the fee-simple of the land, and that they were entitled to be registered as absolute owners thereof in fee-simple, free from burdens.

The remedy of the owner of the rent in such case is to apply to the County Court Judge for relief under s. 11, sub-s. 6, of the Labourers Act, 1906.

Quaere:—Has he a claim to compensation out of the insurance fund established by the Local Registration of Title (Ireland) Act, 1891?

The facts of the case appear from the case stated for the opinion of the Court, which was as follows:—

1. The Limerick (No. 1) Rural District Council acquired compulsorily, under the provisions of the Labourers (Ireland) Acts, 1883 to 1906, a plot of land numbered 193 in the scheme embodied in the Limerick (No. 1) Rural District Labourers Order, 1908.

2. The said plot, prior to the said acquisition, was held by Dame Ada Hervey Bathurst, under a fee-farm grant dated the 2nd May, 1771, subject to a rent of £184 13*s.* 4*d.* per annum, payable to Horace Stafford O'Brien, of Blatherwyke Park, Wansford, Northampton.

3. The said rural district council obtained from the said Ada Hervey Bathurst *prima facie* evidence that she was a person having power to sell under the Land Purchase Acts, and paid to her the sum of £8 16*s.*, being the amount of compensation awarded by the arbitrator to her.

4. The said Ada Hervey Bathurst, pursuant to the provisions of sect. 11, sub-s. 4, of the Labourers (Ireland) Act, 1906, gave the council a receipt for the said compensation in the form prescribed in pursuance of the said Act.

5. No compensation was awarded by the arbitrator to the owner of the rent reserved by the said fee-farm grant, nor was any release or receipt executed by him.

6. The ownership of the lands acquired was not registered prior to the said acquisition, but subsequent thereto the said rural district council transmitted the said receipt to the registering authority under the Local Registration of Title (Ireland) Act, 1891, pursuant to the provisions of sect. 21 of the Labourers (Ireland) Act, 1906, and required the said authority to

register the said rural district council as owner in fee-simple of the said land, free from all burdens, including the said fee-farm rent.

7. The registrar of titles ruled that the registration must be made subject to the fee-farm rent, unless a release or receipt were obtained from the owner thereof.

The question for the Court is: Is the rural district council entitled to be registered as owner in fee-simple, free from the said fee-farm rent, on the mere production to the Land Registry of the said receipt from the owner of the grantee's interest in the said fee-farm grant; or must the registration be made subject to the fee-farm rent unless a separate receipt is obtained from the owner of the said fee-farm rent?

The receipt given by Lady Bathurst was in the form prescribed by the Labourers (Ireland) Act, 1906, and was as follows:—

Labourers (Ireland) Acts, 1883–1906.

The Limerick (No. 1) Rural District Council Labourers Unopposed Order, 1908.

Receipt for purchase-money or compensation.

I, Dame Ada Hervey Bathurst, of The Rectory, Aston Clinton, Tring, in the county of Herts, being the tenant for life of the fee-farm interest in the lands hereinafter mentioned, do hereby acknowledge that I have received from the Rural District Council of the Limerick (No. 1) rural district (hereinafter referred to as the council) the sum of £8 16*s.* as the purchase-money of, or compensation for, all my estate, right, title, and interest in and to all that and those, that parcel of land in the townland of Turagh, in the Electoral Division of Cappaghmore, in the Limerick (No. 1) Rural District, and county of Limerick, containing 2 roods statute measure, authorized to be acquired by the council under the provisions of the Labourers (Ireland) Acts, 1883–1906, and distinguished in the schedule to the said Order, and in the maps and plans deposited by the council, pursuant to the said Acts, by the Number 193 on ordnance sheet 15, county of Limerick.

Dated this 31st day of December, 1909.

(Signed) ADA HERVEY BATHURST.

Madden, J.
1913.

In re LIMERICK (No. 1) RURAL DISTRICT COUNCIL.

Extract from Arbitrator's award:

Reference No. of Plot.	Townland.	Quantity of Land. Statute.	Owner.	Owner's Compensation.	Occupier.	Occupier's Compensation.	Occupier's Reduced Rate.
193	Turagh.	A. R. P. 2 0	Lady Bathurst.	£8 16	Wm. Crowe.	£5	8*s.*

Wylie, for the Local Government Board, referred to the Labourers (Ireland) Act, 1906, sect. 11, sub-ss. 1, 2, 3, 4, 6. Sub-sect. 4 alters the law as existing up to 1906. *In re Parkinson* (1) was decided under the former Acts, which contained no similar provision. The rights of the owner of the rent are safeguarded by sub-s. 6.

Macafee, for the Treasury:—

Admittedly the intention is that compensation shall be paid to every person interested in the lands taken, "so far as same can be reasonably ascertained": Housing of the Working Classes Act, 1890, Schedule II (1); Labourers (Ireland) Order, 1906, Rule 59 (2). Therefore, unless some other remedy is provided for a person whose interest does not appear in the schedule or award, and has not been dealt with by the arbitrator, such interest ought to be preserved by the lands being registered subject to it, as, I submit, is the proper course. The only other remedies which can be suggested are an application for compensation out of the insurance fund established by sect. 92 of the Local Registration of Title Act, or an application to the County Court Judge for relief under sect. 11, sub-s. 6, of the Labourers (Ireland) Act, 1906. The insurance fund cannot be intended to provide the necessary remedy, as the Legislature could not be taken to have created this fund to insure against error, fraud, &c., and at the same time legislated so that in the administration of the Act a constant drain on the fund would be deliberately created by the registering authority. Nor is the remedy to be found in sect. 11, sub-s. 6, of the Act of 1906. If the owner of

(1) [1898] 1 I R. 390.

the rent were to proceed by civil bill under that sub-section, how is the amount to be recovered by him to be ascertained? In order to arrive at the amount, the County Court Judge would have to discharge the functions of an arbitrator under the Act. This sub-section was only intended for cases such as where a person other than the rightful owner had been in possession for a time less than twelve years, but had satisfied the requirements of sub-s. 1, so as to entitle the council to pay the money to him. Sub-s. 4 only gives to the receipt the effect of a conveyance by an owner in fee-simple, free from incumbrances, but not necessarily free from such an interest as a fee-farm rent. [He referred to *In re Parkinson* (1); *R.* (*Eustace*) v. *Local Government Board* (2); Labourers (Ireland) Act, 1883, sect. 7.]

Cur. adv. vult.

Dec. 19.

MADDEN, J.:—

The plot of ground with which this case is conversant was acquired by the district council under the provisions of the Labourers Act of 1906. By the 11th section of that Act a procedure is provided applicable to cases where the purchase-money of a plot acquired by a district council for the erection of labourers' cottages does not exceed £60. It is exceedingly drastic, and the section in which it is embodied is clearly expressed. When the person claiming compensation gives *primâ facie* evidence that he is a person having power to sell under the Land Purchase Acts, and satisfies the district council that "for not less than six years immediately preceding he, or his immediate predecessor in title, has been personally or by an agent in receipt of the rents and profits of the land, or in actual occupation thereof, the claimant may be dealt with by the district council as the absolute owner of the interest in respect of which he claims, and the purchase-money or compensation paid to him."

Sub-s. 4 provides that a person to whom money has been paid under this section shall give the council a receipt in the prescribed form. "In the case of land the ownership of which is not registered, the receipt shall, when given by a person who

(1) [1898] 1 I. R. 390. (2) 44 I. L. T. R. 176.

Madden, J. 1913.

In re Limerick (No. 1) Rural District Council.

may be dealt with as absolute owner, or by a person entitled to a mortgage or charge upon the interest of any such person, be effectual to vest absolutely in the district council the fee-simple of the land in respect of which the purchase-money or compensation was paid."

The extent to which existing proprietary rights are dealt with by this legislation in the interests of simplification and expedition is exemplified by the provision to which the latter portion of this sub-section refers. Under the 2nd sub-section, where land is subject to a mortgage or charge, the compensation may be paid to the mortgagee, or first mortgagee when there is more than one, who is compellable to receive the amount so paid "in reduction of the principal sum for the time being owing in respect of the mortgage or charge, notwithstanding any direction, proviso, or covenant to the contrary contained in any instrument." The receipt of a mortgagee to whom compensation has been made has the same conveyancing operation as the receipt of a person dealt with as absolute owner.

In the present case the compensation was paid to Lady Bathurst, who is the person described in the schedule to the arbitrator's award as owner; William Crowe is described as occupier. The sum of £8 16*s.* is awarded as compensation to the owner, and £5 to the occupier, whose rent is reduced by the sum of 8*s.* No other interest in the lands acquired is dealt with by the award.

Lady Bathurst satisfied the district council that she had power to sell under the Land Purchase Acts, and that she had been in possession for the required period. On payment to her of the compensation awarded to her as owner she gave to the council a receipt in the prescribed form, and the council entered into possession of the land.

The ownership of Lady Bathurst was not registered under the Local Registration of Title Act. Accordingly, the council, in obedience to the 21st section of the Act of 1906, transmitted the receipt of the owner, as the instrument under which they had acquired the land, to the Land Registry for registration under the Act of 1891, whereupon the following provision took effect:— "The title of the district council to the ownership of the land

shall be registered, subject to the provisions of that Act, and the registration shall be made free of all rights and equities referred to in sub-s. 3 of sect. 29 of that Act."

On examination of the owner's title it appeared that the land of which this plot formed part was held under a fee-farm grant of the 2nd May, 1771, subject to a fee-farm rent of £184 13*s.* 4*d.*, payable to one Horace Stafford O'Brien. The registrar of titles held that registration should be subject to this rent as a burden, inasmuch as compensation for this interest in the land had not been awarded, applying to the present case the decision in *In re Parkinson* (1). That case decided that a receipt under the former Labourers Act operated as a statutory conveyance of all the estate and interest of the owner, and of all persons claiming through or under him, but that it did not affect an outstanding estate or interest, such as the purchase annuity payable to the Land Commission, which should be the subject of separate compensation. But the receipt clause in the Act of 1906 is carefully framed for the purpose of attaching to a receipt given under that statute the conveyancing operation which was refused to a receipt under the former Acts by the decision in *In re Parkinson* (1). It is made effectual to vest absolutely in the district council the fee-simple of the land.

If there were nothing more in the statute, the result would be, in a case like the present, to appropriate without compensation the interest of the owner of the rentcharge, which ceases to exist as regards the land purchased by the council.

This being a first registration, it has been suggested that the owner of the rentcharge would have a claim under sect. 93, sub-sect. 1, of the Local Registration of Title Act against the insurance fund established by that statute, in consequence of the non-registration of the rentcharge as a burden, and the Treasury, as the guardian of the insurance fund, have instructed Mr. Macafee to support the ruling of the registrar. The true protection of the insurance fund is to be found in the skill and carefulness of the officials by whom the Act is administered; and how effectual that

(1) [1898] 1 I. R. 390.

Madden, J. 1913.

In re Limerick (No. 1) Rural District Council.

protection has proved is evidenced by the fact that in the twenty-one years during which the Act has been in operation, there has been only one case in which a claim has been made against the insurance fund, and that claim resulted from the omission from the list of burdens of a judgment mortgage the validity of which was an arguable question. In some instances protection of another kind is desirable; and I welcome the intervention of the Treasury in cases which are discussed in Court, where a decision in favour of a litigant would have the effect of placing a burden on the insurance fund.

In the present case, however, the owner of the rent-charge, though without compensation under the arbitrator's award, will not be driven to resort to the insurance fund. I must not be taken as adopting the view that the non-registration of a burden which has ceased to affect the land, by reason of the statutory effect given to the owner's receipt, can be made the subject of compensation from the insurance fund. It is not necessary for me to consider this question, for a mode of compensation has been provided by sub-s. 6 of the 11th section to "any person claiming to be entitled to any money paid to another person" under the provisions of this section. He may "within six years after the payment has been made, on giving such notice as may be required by Rules of Court, apply for relief in manner provided by those rules to the county court within the jurisdiction of which the land is situate." When the full value of the fee-simple of land subject to a rentcharge has been paid to a person treated as owner in fee, without regard to the existence of an existing rentcharge, he has received money to which the rent-chargeant was entitled, to the extent of the compensation which ought to have been awarded to the latter.

It was evidently realized that under the summary procedure of the 11th sect. some interests in the land acquired other than an estate in fee-simple in possession might be overlooked; indeed, inquiry as to their existence is ignored by the conditions prescribed as to six years' possession by sub-sect. 1; and the 6th sub-sect. is intended as a substitute for the assessment of compensation by the award of an arbitrator. Whether it is a satisfactory substitute it is not for me to consider. It was regarded by the

Legislature as adequate, in cases where the purchase-money of all the interests which go to make up an estate in fee-simple does not exceed £60. *Madden, J.* 1913. *In re* LIMERICK (No. 1) RURAL DISTRICT COUNCIL.

As the result of my consideration of this statute, I am of opinion that the registrar is bound to accept the receipt in the present case as an instrument entitling the council to be registered as absolute owners in fee-simple, free from burdens.

Solicitors for the Local Government Board: *T. T. Mecredy & Son.*

Solicitor for the Treasury: *J. Donnelly.*

A. H. W.

McCAUGHEY *v.* STRINGER AND MAHAFFY.

M. R. 1913. Nov. 25.

Practice—Amendment of error in order—Error arising from accidental slip of party seeking to amend order—Order XXVIII, Rule 11.

The Court has jurisdiction to correct an error in an order arising from an accidental slip on the part of the person who obtained the order and seeks to have it corrected, although there was no error in the sense that the order as made did not carry out the intention of the Court.

The plaintiff had obtained on notice of motion an order, which was passed and entered, that the defendant S. should pay to the plaintiff a certain sum less by a sum of £199 which had been already paid into Court. The order followed the terms of the plaintiff's notice of motion, which by mistake gave S. credit for the whole of the sum of £199, he being in fact entitled to credit for only one-half of such sum. The Court, on the application of the plaintiff, amended the order by substituting for the words, "less by the sum of £199," the words, "less by one moiety of the sum of £199."

Chessum and Sons v. *Gordon* ([1901] 1 Q.B. 694) applied and followed.

MOTION.

The plaintiff and the defendants were guarantors of the Spring field Estate Co. The company having gone into liquidation, the plaintiff was made liable for the whole amount guaranteed. He then brought an action against the defendants for contribution. The defendant Stringer consented to judgment, and an inquiry

M. R. 1913.

McCAUGHEY v. STRINGER.

was directed to ascertain whether the defendant Mahaffy (who did not appear in the action) was able to contribute. The chief clerk found that he was not, and the plaintiff thereupon brought a motion to enforce a contribution from the defendant Stringer of one-half of the amount paid by the plaintiff on the guarantee. A sum of £199 4*s.* 11*d.* was received out of the assets of the company, and paid into Court to the credit of the action in relief of the guarantors. By an error the plaintiff's notice of motion asked for an order for payment to the plaintiff, by the defendant Stringer, of the sum of £2603 (being one-half of the sum paid by the plaintiff on the guarantee) "less by the said sum of £199 4*s.* 11*d.*," whereas it should have read "£2603, less by one moiety of the said sum of £199 4*s.* 11*d.*" The order made on the motion followed the terms of the notice of motion. The mistake was only discovered after the order had been passed and entered.

The present application was on the part of the plaintiff to amend the order to one directing the defendant Stringer to pay to the plaintiff the sum of £2603 less by one moiety of the said sum of £199 4*s.* 11*d.*

Megaw, for the plaintiff:—

This is an accidental slip, which the Court has jurisdiction to correct under Order 28, Rule 11. [O'CONNOR, M.R.—But there was no mistake on the part of the Court.] I admit that this was entirely the plaintiff's own mistake, but such a mistake was corrected under the corresponding English rule in *Chessum* v. *Gordon* (1), where after judgment had been drawn up and entered for the plaintiffs, and their costs taxed and paid, they discovered that certain items had been omitted from the bill of costs carried in for taxation. [He also referred to *Fritz* v. *Hobson* (2) and *Barker* v. *Purvis* (3).]

There was no appearance for the defendant Stringer.

(1) [1901] 1 Q. B. 694.
(2) 14 Ch. D. 542.
(3) 56 L. T. (N. S.) 131.

O'CONNOR, M.R. :—

I cannot distinguish this case from those cited. No doubt in this case there was no mistake in the sense that the order made did not carry out the intention of the Court. But still there was a mistake, induced by the form of the notice of motion, and I think that the cases which have been cited by counsel show that I have jurisdiction to correct it. I will grant the application.

Solicitor for the plaintiff: *R. T. Martin.*

A. H. W.

Ross, J.
1913.

April 25.
May 14.

ELLARD *v.* PHELAN.

(1913. No. 117.)

Will — Construction — Charity — Gift to Monastic Orders — Void bequest — 10 Geo. 4, c. 7 — Gift to servant — Satisfaction of debt by legacy — "Legatee" — Whether devisee of real estate included — Bequest of residue "to the several legatees other than charitable legatees hereinbefore named" — Non-charitable legacy given by subsequent clause in will — Right of such legatee to share in residue — Legacies given free of legacy duty — Whether covers succession duty.

Bequest "to the Superior for the time being of the Cistercian monastery, Mount Melleray, the sum of £1000 for the use and benefit of said monastery, and the works of charity carried on by said Order": *held* void, as being a gift to an illegal community.

Bequest to a servant held to be a satisfaction of wages due to him by the testator at the time of his death.

Bequest of the residue "to the several legatees other than charitable legatees hereinbefore named."

Held, that "legatees" meant persons to whom a bequest of personalty was made, and did not include a devisee of a freehold farm.

Held, also, that a legatee to whom a non-charitable legacy was given by a subsequent clause in the will was entitled to a share in the residue.

After giving certain pecuniary legacies, the testator devised a freehold farm to F., and directed "all said legacies to be paid free of legacy duty."

Held, not to apply to the devise of the farm so as to cover succession duty.

SUMMONS for the determination of questions arising on the construction of the will of Patrick Finn, of Mitchelstown, Co. Cork.

Patrick Finn died on the 24th October, 1911, having made his last will dated 21st October, 1911, of which the portions material to the present report are as follows:—

"I bequeath the following pecuniary legacies, viz.:—to William Finn, son of Owen Finn of Coolenave, £100; to the Rev. Superior for the time being of the Cistercian Monastery, Mount Melleray, Co. Waterford, the sum of £1000 for the use and benefit of said Monastery, and the works of charity carried on by said order, and with a request that they will say Masses

for the repose of my soul and the souls of my relatives and friends; to the Very Rev. Canon Rice, P.P., Mitchelstown, £150 for Masses for the repose of my soul, and the souls of my friends and relatives, the stipend for each Mass to be five shillings; to the Rev. Michael Ellard, C.C., the Rev. Thomas Flannery, C.C., and the Rev. — Walsh, C.C., curates Mitchelstown, £100 each for Masses for the repose of my soul, and the souls of my relatives and friends, the stipend for each Mass to be five shillings, all said. Masses to be celebrated in public, in a public church in Ireland; to the Rev. Mother of the Presentation Convent, Mitchelstown, the sum of £200 for the use and benefit of said convent, and in aid of the charitable works carried on by them; ... to Nora Howard, spinster, my housekeeper, £200; to Thomas Donovan, my assistant, £100. . . . I direct my executors and trustees, hereinafter named, to invest out of my assets a sum of £500 and pay the income thereof to my niece, Honora Leahy, for life, and after her death to divide said sum amongst her children, should she leave children her surviving, in such shares and proportions as she shall by deed or will appoint, but should my said niece die without leaving children or a child, in that event I leave the said sum of £500 to Owen Finn of Coolaregan; to the Very Rev. Canon Rice, P.P., the sum of £50 towards expenses of organ now being purchased for the parish church . . . I give, devise, and bequeath my farm of land at Coolenave, held under a judicial tenancy, to Michael Finn; I give, devise, and bequeath all the residue of my property to the several legatees other than charitable legatees hereinbefore named in equal shares and proportions; I direct all said legacies to be paid free of legacy duty. . . . In addition to the foregoing bequests, I leave to Ellen Finn, daughter of Owen Finn of Coolenave, £50."

Norah Howard and Thomas Donovan were respectively servant and clerk in the employment of the testator at the date of the execution of the will, and there was then due for wages to Norah Howard a sum of £12 0*s.* 6*d.*, and to Thomas Donovan, a sum of £23 11*s.*, which sums remained due at the testator's death.

The present summons was brought by the plaintiff, the executor of the will, for the determination of, amongst others,

Ross, J. 1913.

ELLARD v. PHELAN.

the following questions arising on the construction of the will:— (*a*) whether the bequest of £1000 to the Rev. Superior for the time being of the Cistercian Monastery, Mount Melleray, Co. Waterford, was a valid bequest in whole or in part; (*b*) whether the legacies to the housekeeper, Norah Howard, and the assistant, Thomas Donovan, were to be paid over and above such wages or salary as were due to them by the testator at the time of his death; (*c*) whether the clause in the will, "I give, devise, and bequeath all the residue of my property to the several legatees other than charitable hereinbefore named in equal shares and proportions," applies to William Finn, Michael Finn, William Finn (son of Patrick Finn), and Ellen Finn; (*d*) whether the clause in the will, "I direct all said legacies to be paid free of legacy duty," applied to the farm devised to Michael Finn, so as to cover succession duty.

P. D. Fleming, K.C., and *M. F. Linehan*, for the executors.

Norwood, for the residuary legatees:—

Legacies to monastic orders are void under the Catholic Emancipation Act (10 Geo. 4, c. 7): *Cussen* v. *Hynes* (1); *Carbery* v. *Cox* (2). The addition of the words "and the works of charity carried on by said order" does not make the bequest good: *Hunter* v. *Attorney-General* (3). The whole gift fails if it is doubtful how much is charitable and how much indefinite. A gift to a convent is void: *Walsh* v. *Walsh* (4).

Legacies are satisfaction, in whole or part, of the wages due to the testator's servants at the time of his death, unless a contrary intention appear from the will: Smith on Master and Servant, 6th ed., p. 466. No such contrary intention appears in the will here.

Serjeant Sullivan, K.C., and *M. F. Healy*, for the Abbot of Mount Melleray:—

If the gift be to the members of the community living at the death of the testator, *nominatim*, and not to the community, it is good: *Bradshaw* v. *Jackman* (5); *Stewart* v. *Green* (6);

(1) [1906] 1 I. R. 539.
(2) 3 Ir. Ch. R. 231.
(3) [1899] A. C. 309.
(4) I. R. 4 Eq. 396.
(5) 21 L. R. Ir. 12.
(6) I. R. 5 Eq. 470.

In re Delany's Estate (1); *In re Wilkinson's Trusts* (2); *Burke* v. *Power* (3). Where the gift is to a charitable object, even if the instrument to be employed is a religious order, the gift will be declared good as a charitable gift. The Court will, if necessary, divide the fund into two equal moieties and declare half to be good: *Salusbury* v. *Denton* (4). *O'Hanlon* v. *Logue* (5) reverses the general policy of the law towards charitable gifts. The *dicta* in *Stewart* v. *Green* (6) are now established law.

T. Sullivan, for William Finn, a legatee.

Bowen, for Ellen Finn, a legatee.

Joseph Healy, for Michael Finn, the devisee of testator's farm:—

"Legatee" may include "devisee": *Hardacre* v. *Nash* (7); *Travers* v. *O'Donoghue* (8).

On the question of a legacy to a servant being a satisfaction of a debt, *Richardson* v. *Greese* (9) was cited.

D. F. Condon, for the Presentation Convent, Mitchelstown.

Cur. adv. vult.

May 14.

Ross, J.:—

Patrick Finn made his will on 21st October, 1911. The first bequest with which I am concerned is: "To the Reverend Superior for the time being of the Cistercian Monastery, Mount Melleray, Co. Waterford, the sum of £1000 for the use and benefit of the said monastery and the works of charity carried on by the said order."

1. The first question I am called on to decide is whether this is a valid bequest in whole or in part. If I were free from the authorities, I should think the question easy to answer. The Reverend Superior for the time being means the Superior who may be in office at the time of the testator's death. He is constituted a trustee to receive the legacy. He is to apply it for the benefit

(1) 9 L. R. Ir. 226.
(2) 19 L. R. Ir. 531.
(3) [1905] 1 I. R. 119.
(4) 3 K. & J. 529.
(5) [1906] 1 I. R. 247.
(6) I. R. 5 Eq. 470.
(7) 5 T. R. 716.
(8) [1910] 1 I. R. 239.
(9) 3 Atk. 64.

Ross, J. 1913.

ELLARD v. PHELAN.

of the monastery, that is, the community in Mount Melleray, Waterford, and the works of charity carried on by the order in that monastery.

The gift is plainly for the community in the aggregate. It is suggested that it might be construed as a gift to the individual monks. This contention is grounded on certain decisions in which it was held in the case of gifts to convents that the gifts might be taken to apply to the individual sisters so as to avoid a perpetuity. An observation of Lord Justice FitzGibbon in *Cussen* v. *Hynes* (1) shows that these decisions cannot affect the question. "The distinction," he says, "between a community as a continuing or quasi-corporate body, and the individual members of a community for the time being, appears to me to become material only when the validity of a gift otherwise valid depends upon avoiding infringement of the rule against perpetuities." This is a gift for the benefit of a community and its works of charity. But the community is illegal, and its members can have no legal existence.

It is again contended that although the first part of the gift may fail, so much of the gift can be supported as benefits the works of charity carried on by the order. It is said that equity will not allow a valid trust to be defeated for want of a proper trustee. It is contended that the gift for the purpose of the works of the order is a charitable disposition, and ought therefore to be supported though the community is illegal. I think the contention cannot be maintained—a gift for the support of the works carried on by the order is just the same as a gift to the order itself. I must therefore answer the first question by declaring the bequest wholly void.

2. The second question is whether legacies to Nora Howard and Thomas Donovan are to be paid to them over and above the wages due to them by the testator at his death. There is an impression that such legacies are not a satisfaction of servants' wages, but I do not find any authority to support the impression, and therefore the ordinary law must be applied. I answer the question in the negative.

3. The next question is whether the bequest of the residue

(1) [1906] 1 I. R. 539.

applies to Michael Finn, William Finn (son of Patrick Finn, of Coolanave), and Ellen Finn. I think the term "legatee" in the will means a person to whom a bequest of personalty has been made. Although the testator describes the farm as held under a judicial tenancy, it is, in fact, real estate. The word "devise" as applied to a legacy must simply be read as "bequeath." Therefore I hold that Michael Finn is not entitled to partake in the residue within the meaning of the clause. I think Ellen Finn is put in the same position as the other legatees, and ought to partake in the residue.

4. As to question 4, the testator directs legacies only to be free of legacy duty, and this cannot apply so as to free the devises from succession duty.

Solicitor for the executors and for the Presentation Convent: *Richard Rice.*

Solicitor for the Abbot of Mount Melleray: *Maurice Healy.*

Solicitor for the residuary and other legatees: *Anthony Carroll.*

D. M. S.

IN RE BURKE.

WOOD, AND ANOTHER *v.* TAYLOR AND OTHERS.

(1912. No. 454.)

Will—Construction—Bequest of debts due at testator's death—Dividends declared after testator's death—Portion accrued during his lifetime—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35).

A testator bequeathed "all the debts and accounts due to me at the time of my death, except rents issuing out of houses and lands," to T.

Held, that the bequest did not include the apportioned part, accrued during testator's lifetime, of dividends declared after his death in respect of the half-year in the course of which he died.

SUMMONS.

By his will, dated 31st July, 1908, John Burke made the following bequest:—"I bequeath all the debts and accounts due to me at the time of my death, except rents issuing out of houses and lands, to my grand-daughter, the said Louisa Mary Taylor." He appointed the plaintiffs his executors. Testator died in 1911,

Barton, J. 1913.

WOOD v. TAYLOR.

and probate of the will was granted to the plaintiffs. The testator, at the time of his death, held shares in certain companies, the dividends on which were declared half-yearly. The testator died in the course of a half-year in respect of which half-yearly dividends on these shares were declared after his death. The present summons was issued by the plaintiffs for the decision of various questions arising on the construction of the will. The principal question was, whether the above bequest included the apportioned parts, accrued during testator's lifetime, of the dividends declared after his death in respect of the half-year in the course of which he died.

Serjeant Matheson, K.C., for the plaintiffs :—

Duncan, for Louisa Mary Taylor :—

"All the debts and accounts due to me at the time of my death, except rents issuing out of houses and lands," include an apportioned part of these dividends. Apportionment arises either—1, by the intention of the testator as expressed in the will, or, 2, by the Apportionment Act, 1870 (33 & 34 Vict. c. 35), interpreting that intention.

1. Testator's separation of debts and accounts from the other properties bequeathed by his will, taken with the reservation of "rents issuing out of houses and lands," shows an intention to give a wide meaning to the phrase "debts and accounts," and to apportion dividends declared after his death. "Debts" in a will need not necessarily be liquidated sums actually payable at the death of the testator: *Stenhouse* v. *Mitchell* (1); *Bainbridge* v. *Bainbridge* (2); *Webb* v. *Derbyshire* (3).

2. If the terms of the will do not explicitly apportion the dividends, apportionment may still arise by virtue of the Apportionment Act, 1870. "Testator makes his will, having the Act of Parliament in view . . . The words he uses are not to be construed without regard to the Act of Parliament": Selborne, L.C., in *Jones* v. *Ogle* (4), at page 195. The Apportionment Act, 1870,

(1) 11 Ves. 352.
(2) 9 Sim. 16.
(3) [1906] 1 Ch. 135.
(4) L. R. 8 Ch. 192, at p. 195.

sect. 2, provides that all dividends shall, "like interest or money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." Therefore an apportioned part of the dividends declared after the death of the testator had accrued at the date of his death, and would pass under the gift of all debts and accounts due at the death of the testator: *Treacy* v. *Corcoran* (1); *Carr* v. *Griffith* (2). Sect. 3 of the Apportionment Act, providing that the apportioned part is not to be payable or recoverable until the entire portion becomes due, does not apply to dividends; it is restricted to "the case of a continuing rent, annuity, or other such payment," which may possibly be "determined by re-entry, death, or otherwise." The earlier words of the section explicitly mention "dividend," in order that it may be implicitly excepted. Cases explaining the meaning of "all debts owing or accruing" in Ord. XLV, Rule 1, are not applicable to the word "debts" in the present will. Decisions under a Rule of Court intended to give a creditor a summary remedy for a liquidated debt cannot be used to explain the intention of the testator as expressed in this will.

Webb v. *Stenton* (3) turned on the questions whether a trustee was a debtor to his *cestui que trust*, and whether the trustee, at the time of the order made, had in his hands money actually payable to his *cestui que trust*. Sect. 5 of the Apportionment Act, in defining "dividends," makes apportionable not only the dividend, but also the source of the dividend, the "divisible revenues." In *Webb* v. *Stenton* (3) the Apportionment Act, and the decisions under it, were not referred to; the decision refers solely to Ord. XLV. *Barnett* v. *Eastman* (4) was decided on the authority of *Webb* v. *Stenton* (3), and refers only to an annual rent, payable quarterly, from which dividends are clearly distinguished in the definitions of "dividends" and "rents" in sect. 5 of the Apportionment Act. [He also referred to *Lysaght* v. *Lysaght* (5); *Oppenheimer* v. *Boatman* (6); *Theobald* v. *White* (7).]

(1) I. R. 8 C. L. 40.
(2) 12 Ch. D. 655.
(3) 11 Q. B. D. 518.
(4) 67 L. J. Q. B. 517.
(5) [1898] 1 Ch. 115.
(6) [1907] 1 Ch. 399.
(7) [1913] 1 Ch. 231.

Barton, J. 1913.

WOOD *v.* TAYLOR.

James Henry, for the defendants, the residuary legatees :—

The word "debt," in the sense used by the testator, does not capture the dividends. *In re Severn and Wye and Severn Bridge Railway Co.* (1) decides that where a company declares a dividend on its shares, a debt immediately becomes payable to each shareholder in respect of his dividend, for which he can sue at law; and Lord Lindley, in his book on Companies (6th ed., p. 609), says :—"Dividends, which are actually declared and payable by an incorporated company, are recoverable by action brought by the person having the legal right to receive them against the company. . . . The plaintiff must prove that the dividend sought to be recovered has been declared, and has become payable." It is clear, therefore, that these dividends were not "debts," as they were not actually declared till after testator's death. They cannot be debts within the meaning of the Apportionment Act : Encyclopædia of Laws of England, vol. i., 428.

BARTON, J. :—

This case is concerned with the construction of the following bequest in the will of John Burke :—"I bequeath all the debts and accounts due to me at the time of my death, except rents issuing out of houses and lands, to my grand-daughter, the said Louisa Mary Taylor." The Court is asked to say whether all or any of the thirteen scheduled items of property come within the terms of this bequest, in construing which the word "debts" must, in view of the exception of rents, be read in a comprehensive sense. For example, the word "debts" in this bequest includes "dividends."

[Having disposed of the other items, his Lordship proceeded :—]

The question remains whether the bequest includes the apportioned parts of dividends, where dividends were declared after the testator's death for the half-year in the course of which the testator died. By the Apportionment Act, 1870, dividends are to be considered as accruing from day to day, and as apportionable

(1) [1896] 1 Ch. 559.

in respect of time accordingly (sect. 2), but are payable or recoverable "when the entire portion of which such apportioned part shall form part shall become due and payable, and not before" (sect. 3). The word "dividends" includes all divisible revenue, which is deemed to accrue by equal daily increment during the period for which the dividend shall be declared (sect. 5).

Mr. Duncan, who argued the case very ably, referred me to *Webb* v. *Derbyshire* (1) and *Barnett* v. *Eastman* (2); and some other cases with reference to the attachment of future or probable debts have also been cited. None of these cases are directly in point. I have to construe the words "debts and accounts due to me at the time of my death, except rents," etc., and to apply these words to a dividend which was not declared until after the testator's death. The test is whether the apportioned part of such dividend was a *debitum in præsenti* at the date of the testator's death, or, in other words, whether the relation of debtor and creditor existed at the date of testator's death in respect of such apportioned part. I think not. It was accruing, but was not yet "due." Unless and until dividends became distributable, the relation of debtor and creditor did not arise. The apportioned part of the dividend was accruing, and was a future and probable debt, but it was not a debt due to the testator at his death.

Solicitor for the plaintiffs: *H. J. M'Cormick.*
Solicitor for the defendants: *W. J. M. Coulter.*
Solicitor for Lousa Mary Taylor; *John F. Whitsitt.*

R. W. L.

(1) [1906] 1 Ch. 135. (2) 67 L. J. Q. B. 517.

M. R.
1913.
Nov. 25.

In re GANNON.

SPENCE and Another *v.* MARTIN and Others.

Will—Construction—Devise, whether in fee or for life—Devise of portion of freehold farm to A *without words of limitation, and subject to a rent—Devise of whole farm to* B *and* C, *subject to tenancy bequeathed to* A—*Wills Act* (1 *Vict. c.* 26), *s.* 28—*Contrary intention.*

A testator by his will, executed in 1908, bequeathed to P. G. "the field (with his house thereon) containing about 11 Irish acres, subject to a rent of £1 per Irish acre to be paid to my nephews, N. M. and J. M." The field formed part of the farm of M., which was held by the testator in fee-simple, and was devised to N. M. and J. M. in these words: "I leave, devise, and bequeath to my two nephews, N. M. and J. M., my house and farm at M. (subject to the tenancy hereinbefore bequeathed to P. G.)." . . .

Held, that the description in the will of P. G.'s interest as a "tenancy," coupled with the fact of a rent being payable by him to N. M. and J. M., afforded such evidence of a contrary intention as prevented sect. 28 of the Wills Act from applying, and that P. G. took only an estate for life in the field.

Summons.

By his will, dated the 4th December, 1908, Francis Gannon, who was the owner of a farm called Moymet, held in fee-simple subject to an annuity of £227 10*s.* payable to the Irish Land Commission, made (*inter alia*) the following bequests:—"I give and bequeath to Patrick Gannon, my herd, the sum of £100, also the field (with his house thereon), containing about 11 Irish acres subject to a rent of £1 per Irish acre per year, to be paid to my nephews, Nicholas Martin and James Martin (hereinafter mentioned) in half-yearly instalments . . . I leave, devise, and bequeath to my two nephews, Nicholas Martin and James Martin, my house and farm at Moymet (subject to the tenancy already hereinbefore bequeathed to Patrick Gannon), same to be managed by them for their joint benefit during their joint lives, and to go to the survivor during his life," with certain gifts over.

It appeared from the affidavit of William H. Spence, one of

the executors of the will of Francis Gannon, that the executors, having assented to the bequests contained in the will, an application was made to the Land Registry authorities for the registration of Nicholas Martin and James Martin as joint tenants for life of the farm of Moymet, subject to the letting to Patrick Gannon. The Land Registry authorities raised a question as to the nature of the interest passing to Patrick Gannon under the will. The present summons was accordingly taken out by the executors for the opinion of the Court on the question whether the bequest of the field containing about 11 Irish acres (part of the testator's said farm of Moymet) to the defendant Patrick Gannon, was for an estate in fee-simple, subject to a rent of £1 per Irish acre payable as directed by the testator, or, if not, what estate Patrick Gannon took in the said field, and how subject.

D. J. O'Brien, for the plaintiffs.

Carrigan, K.C., for the defendant Patrick Gannon.

Section 28 of the Wills Act provides that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of, unless a contrary intention shall appear by the will. The reservation of a rent is not evidence of such contrary intention. *Morrough* v. *Lord Dufferin* (1); *M'Naghten* v. *Boyd* (2).

Rearden, for the Attorney-General, representing certain charities interested in remainder:—

The section of the Wills Act does not help the defendant if a contrary intention can be collected from the will. Here there is evidence of a contrary intention. Not only is the field made subject to a rent payable to the persons to whom the whole farm is devised, but the testator speaks of the interest of Patrick Gannon as a "tenancy."

Carrigan, K.C., in reply, referred to *Rea* v. *Rawlinson* (3).

(1) 2 Jones, 719. (2) 2 Ir. Jur. (N. S.) 177. (3) 29 Beav. 88.

M. R. 1913.

SPENCE *v.* MARTIN.

O'CONNOR, M.R. :—

In my opinion the will creates a gift only for the life of Patrick Gannon. If the early part of the will stood by itself, that might be construed as a gift of the field in fee-simple, subject to a rentcharge of £1 per acre yearly. But when I come to the later part of the will, I find this devise to the testator's two nephews :—"I leave, devise, and bequeath to my two nephews, Nicholas Martin and James Martin, my house and farm at Moymet (subject to the tenancy hereinbefore bequeathed to Patrick Gannon), same to be managed by them for their joint benefit during their joint lives, and to go to the survivor during his life." Here the testator himself interprets the bequest to Patrick Gannon in the previous portion of the will as constituting a tenancy to his nephews. That is entirely inconsistent with a gift in fee-simple, which cannot be held of another person. That being so, the case falls within the proviso to the 28th sect. of the Wills Act, and I am referred back to the old law prior to that Act, under which a gift without words of limitation carried only a life estate. I will declare that Patrick Gannon takes a gift of the 11 acres for his life only, subject to the yearly rent of £1 per Irish acre payable to the testator's nephews.

Solicitors for the plaintiffs : *John Clark & Co.*

Solicitor for the defendants Nicholas Martin and James Martin : *A. E. Walker.*

Solicitor for defendant Patrick Gannon : *Frederick M. J. Lyons.*

Solicitor for the Attorney-General : *George Collins.*

A. H. W.

In re CONDRIN.

COLOHAN *v.* CONDRIN.

M. R.
1914.
Jan. 14.

Resulting trust—Presumption of advancement—Husband and wife—Deposit receipt in names of husband, wife, and third party.

A placed on deposit receipt with his bankers the sum of £1200, his own money, in the names of himself, his wife, and his brother. By his will, made shortly afterwards, he left all his property to his wife and his brother for their lives, and after their deaths for charitable purposes. There was no evidence beyond the fact of the deposit to show A's intention in making it in the joint names.

Held, that the presumption of advancement in favour of the wife was not affected by the insertion of the name of the brother in the receipt, and that he was trustee of the fund for her.

Eykyn's Trusts (6 Ch. D. 115) followed.

Adjourned Summons.

The facts of the case were as follows:—

Philip Condrin, of Castle Street, Bray, Co. Wicklow, was a builder and owner of houses at Bray. His elder brother, Daniel Condrin, who was aged 78, was a plumber, and lived with and was supported by his brother, and assisted him in his business and the management of his property. On May 27th, 1909, Philip Condrin had a deposit and current account with the Hibernian Bank, Bray. On that day he withdrew from deposit the sum of £1135 19*s.* 1*d.*, and placed that sum, together with £64 0*s.* 11*d.*, making in all £1200, on deposit receipt in the joint names of himself, Amelia Condrin, his wife, and Daniel Condrin, his brother. The deposit receipt was in the form usually issued by bankers.

About May 27th, 1909, Philip Condrin told his wife that he was about to withdraw the deposit receipt for £1135 19*s.* 1*d.*, and to place £1200 on deposit receipt in the bank in the joint names of himself, herself, and his brother Daniel Condrin. She could not recollect further what he said on that occasion, but she distinctly understood from him that his intention in making the deposit was

M. R. 1914.

COLOHAN v. CONDRIN.

that she and Daniel Condrin should have the moneys so deposited in the event of anything happening to him. After this conversation on the 27th May, 1909, Philip Condrin went to the bank by himself, and brought back slips on which she and Daniel Condrin signed their names. She was informed that these slips were required by the bank for the signature book. Philip Condrin then took the slips away, and when going out said to her that the placing of the money on deposit receipt would be less expensive when the will would be made. He then took the slips away, and shortly afterwards came back with the deposit receipt for £1200, in the joint names of himself, herself, and Daniel Condrin. He then gave the deposit receipt to her, to put up with the other papers, such as share certificates, which she kept for him.

These facts appeared from the affidavits of the bank manager and of Amelia Condrin. It also appeared from her affidavit that Philip Condrin had given her money from time to time before and after the date of the deposit of the £1200, amounting to about £260, which he told her was for herself, and to place it on deposit receipt in her own name, which she did.

No communication was made by Philip Condrin to the bank officials, or to anyone else, as to his intention in making the deposit of £1200.

Shortly afterwards, on July 28th, 1909, Philip Condrin made his will, leaving all his leasehold property in Bray to his wife Amelia Condrin and his brother Daniel Condrin, as joint tenants for their joint lives, and to the survivor for his or her life, and directing the said property to be sold after their deaths, and the proceeds to be applied for the rebuilding and improvement of the Roman Catholic Church of Bray known as the Church of the Holy Redeemer, and leaving whatever other assets, money, shares and stocks, he should die possessed of, and his residuary estate, to his trustees and executors, on trust to pay the income thereof to his wife and brother for their joint lives and the survivor for his or her life, and after their deaths he directed the same, or whatever should represent the same, to be applied to the improvement and repairs of the Roman Catholic Church of Little Bray known as St. Peter's. He appointed Archdeacon Gorman, or whoever should be parish priest of Bray

at the time of his death, and the Most Rev. William J. Walsh, or whoever should be Archbishop of Dublin at the time of his death, his executors.

Philip Condrin died on March 4th, 1913. The will was proved by the plaintiff, the Rev. R. F. Colohan, parish priest of Bray. No mention of the deposit receipt was made by Philip Condrin to Mr. O'Meara, the solicitor who prepared his will, although the testator purported to give his solicitor a full account of his property.

The £1200 remained on deposit in the Bank at the death of Philip Condrin, and the receipt was endorsed by Amelia Condrin and Daniel Condrin, and the amount of it and interest transferred to the executor's account at the Bank, but they claimed it as their property as survivors.

This summons was accordingly taken out by the executor, the Rev. R. F. Colohan, against Amelia Condrin and Daniel Condrin as defendants, that it might be determined whether the sum of £1200 was the property of Amelia Condrin and Daniel Condrin, as survivors of Philip Condrin, or whether it formed part of the estate of Philip Condrin. The summons was served on the Attorney-General for Ireland, as representing the charities.

Herbert Wilson, K.C., and *Bodkin*, for the plaintiff:—

In re Eykyn's Trusts (1) will be relied on on behalf of Mrs. Condrin, but the question raised here is different from the question in that case, which was whether railway stock transferred by a husband into the names of himself, his wife, and a stranger, formed part of his residuary estate, or were advancements for the benefit of the wife. Malins, V.-C., held there that they were advancements for the benefit of the wife, and that the introduction of the name of a stranger made no difference. There is no reported case on that point before or since. In *Marshall* v. *Crutwell* (2), there were surrounding circumstances, as here, which led Jessel, M.R., to decide that money to the credit of a banking account in the joint names of husband and wife was not meant to be an advancement to the wife.

(1) 6 Ch. D. 115. (2) 20 Eq. 328.

M. R. 1914.

COLOHAN v. CONDRIN.

Carrigan, K.C., and *Swayne*, for the defendants:—

The money here is not assets of Philip Condrin; it was an advancement for the wife in the event of her surviving him, and the introduction of the name of Daniel Condrin into the receipt makes no difference; he is only a trustee for her, and makes no claim to the money. If the receipt had been in the names of the husband and wife only, it would be the property of the wife by advancement, as there is nothing to rebut the presumption that Philip Condrin intended it to be for her if she survived him. The statement in the wife's affidavit that her husband said to her that it "would be less expensive when the will would be made," if it is to be regarded as an expression of his intention, shows an intention to benefit her, referring probably to a supposed saving of duty. He may have intended to benefit his brother Daniel as well as his wife; but there is no evidence of that, and he must be treated as a stranger, and is a trustee for her.

Eykyn's Trusts (1) is directly in point. It has not been questioned since, and is cited in White and Tudor's Leading Cases in Equity, in the notes to *Dyer* v. *Dyer* (2), as an authority for the proposition that a stranger, on the purchase by a husband, taking jointly with the husband and wife, must hold the estate vested in him in trust for the survivor of the husband and wife. In Lewin on Trusts (10th ed.), p. 187, the editor says that the doctrine of advancement has been applied to the case of an investment by a husband in the joint names of himself, his wife and a stranger, and cites *Eykyn's Trusts* (1) in support of that statement. The principle was recognized in *Kingdon* v. *Bridges* (3), *Lamplugh* v. *Lamplugh* (4), and *Rumboll* v. *Rumboll* (5).

The Solicitor-General (*Pim, K.C.*) and *Rearden*, for the Attorney-General:—

Kingdon v. *Bridges* (3) was governed by the old law that a wife could not be a trustee for her husband, and therefore

(1) 6 Ch. D. 115.
(2) Vol. 2 (8th ed.), pp. 844, 845.
(3) [1688] 2 Vern. 67.
(4) [1709] 1 P. Wms. 111.
(5) [1761] 2 Eden, 15.

a third name had to be put in. There was no intention in those cases to benefit the third party. In *Eykyn's Trusts* (1) the intention and object was to benefit the wife only. In *Marshall* v. *Crutwell* (2) there was slight evidence of advancement, but there were other circumstances which entitled Jessel, M.R., to say that the presumption of advancement was rebutted. In *Lloyd* v. *Pughe* (3), a wife, being executrix and residuary legatee of her father, paid the moneys she received into a bank in her own name as such executrix. Her husband paid money of his own to this account, and the wife drew cheques on the account for payment of debts due by the husband and for payment of household expenses. The husband predeceased the wife, who died shortly afterwards. Malins, V.-C., held that the money in bank belonged to the wife's estate. The Court of Appeal reversed the decision, and held that it was a mere agency account by the husband, without any contract which would give the wife an interest in the money.

The facts of this case show that the intention of the testator was to benefit his wife and brother equally. He treated them equally in his will, and when he placed the money in their names and his own, he did not intend to give it to them absolutely if they survived him, but only that it should follow the trusts of his will. If Daniel Condrin is to be treated as a stranger, there is no evidence of intention to benefit him, and he cannot take anything. The case of the wife is different, as no evidence is required, and there would be a presumption that she was to take half the money, if she survived, but no more. The statement made by the testator as to saving of expense when the will would be made, might mean saving of duty, or it might indicate an intention to dispose of the money in the same way as in his will. The other circumstance is the relationship between the parties, and the treatment by the testator of his wife and brother equally.

It is submitted therefore—1, that there was no advancement

(1) 6 Ch. D. 115.
(2) 20 Eq. 328.
(3) 14 Eq. 241; 8 Ch. 88.

M. R. 1914.

COLOHAN *v.* CONDRIN.

at all; or 2, that there was an advancement of a moiety to the wife, and that there was a resulting trust of the other moiety to the testator.

O'CONNOR, M.R. :—

I have no doubt in this case. On May 27th, 1909, Philip Condrin lodged on deposit receipt in the Hibernian Bank at Bray the sum of £1200, in the names of himself, Amelia Condrin, his wife, and Daniel Condrin, his brother. That made them joint tenants at law of that sum of money. A question has been raised whether Philip Condrin by this transaction intended to confer a benefit upon Amelia Condrin and Daniel Condrin, or either of them. Outside the transaction itself there is no evidence to throw any real light upon the deposit. One circumstance relied on is the statement in Amelia Condrin's affidavit that the deceased said to her that it would save expense when he made his will, but that statement, if made, was an ambiguous expression.

Another circumstance relied on is the fact that the deceased gave other sums of money to his wife during his lifetime. That might be availed of as an argument by both sides. On the one hand, it might be urged as an indication of intention to confer a further benefit on his wife. On the other hand, it might be said that, having already provided her with money, there was no reason why he should give her more. Again, the evidence of Mr. O'Meara, the testator's solicitor, might be relied on in favour of the view that the intention of the deceased was to benefit his wife. He says that he prepared the testator's will, and asked him what property he had, and that he did not mention the deposit of the £1200, while he purported to give a full account of his property. The widow and Daniel Condrin might rely on that as showing an intention to subtract that sum from the assets. On the other hand, it might be argued that he intended to conceal the transaction from everyone, including his own solicitor, in order to avoid, as he thought, payment of duty.

We are therefore driven to see what was the legal effect of the transaction itself, apart from all external evidence. It is well settled that if a deposit is made with a bank by a husband of his own money in the names of himself and his wife,

there is a presumption that it is intended as an advancement for the wife in the event of her surviving her husband. The question is, what difference, if any, is made by the introduction of the name of a third person, a stranger, into the deposit receipt. There is no case made to deprive the wife of the presumption in her favour because a stranger is joined in the deposit receipt.

It has not been argued by Mr. Swayne that Daniel Condrin took any beneficial interest himself; he admitted that, as Daniel Condrin was to be regarded as a stranger, there must be express evidence of an intention to benefit him, and that there was none. His name must be taken to have been introduced as a trustee for the person or persons having the beneficial interest, that is to say, for the husband and wife during their joint lives, and, after the death of one, for the survivor, in the present case the wife. That is in accordance with the decision of Malins, V.-C., in *Eykyn's Trusts* (1). Mr. Wilson argued that that case was not of much authority, but, as was pointed out by Mr. Swayne, it is recognized as law by the editors of White and Tudor's Leading Cases in Equity. The note in vol. 2 (8th ed.), p. 849, is as follows:—"A stranger on a purchase by a husband, taking jointly with the husband and wife, must hold the estate vested in him in trust for the survivor of the husband and wife: *Re Eykyn's Trusts* (1)."

I cannot act on probabilities. The presumption of law is in favour of an advancement to the wife; that can only be got rid of by coercive evidence, not by probability. I must, therefore, hold that the fund was not part of the estate of Philip Condrin.

Solicitor for the plaintiff: *T. O'Meara.*
Solicitor for the defendants: *M. Dawson.*
Solicitor for the Attorney-General: *Geo. Collins.*

W. L.

(1 6 Ch. D. 115.

Wylie, J.
1913.
June 17, 18, 24.
Appeal.
Nov. 28.
Dec. 1.

In the MATTER of the ESTATE of the EARL of CARYSFORT.

Land Purchase Acts—Superior interest—Redemption of—Crown reversion on estate in tail male—Large number of male issue living—Distribution of purchase-money without regard to Crown reversion—Land Law (Ireland) Act, 1896 (59 & 60 *Vict. c.* 47), *s.* 31, *sub-s.* 5—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 98, *sub-s.* 2.

The Crown was entitled to a reversion expectant on the determination of an estate in tail male in lands sold under the Land Purchase Acts. At the date of the sale there were living seventeen male issue of the original tenant in tail.

Held, by the Court of Appeal, that the reversion was of no appreciable value, and might, without the consent of the Crown, be disregarded in the distribution of the purchase-money.

Application by the vendor for an order that the reversion claimed by the Crown in respect of the lands which had been sold in this matter under the Land Purchase Acts be redeemed, and the redemption price thereof fixed.

The facts were as follows:—The lands which had been sold in this matter were not charged with any quit or crown rent, but were part of the manor of Arklow, granted, with other lands, by a patent of Henry 8, to Peter Butler, Earl of Ossory and Ormonde, and James, Lord Butler, his eldest son, for the term of their lives, and the life of the survivor of them, and to the heirs male of the body of the said Peter, lawfully begotten, for ever. By certain private Acts of Parliament, viz., 7 & 8 Wm. 3, 9 Wm. 3, and 13 Wm. 3, the Dukes of Ormonde, who were lineal descendants of the said Peter Butler, Earl of Ossory and Ormonde, were empowered to make leases for lives renewable for ever, and fee-farm grants of portions of the estates comprised in the grant from the Crown; it was, however, declared that there was saved and reserved "to his Majesty, his heirs, and successors, all his and their right, title, and interest of, into, and out of all or any of the manors, lordships, towns, houses, lands, tenements, and

hereditaments." The lands which had been sold in this matter were held under fee-farm grant, made, pursuant to the powers contained in the said Acts, to a predecessor in title of the vendor. It was admitted that there were at present living at least seventeen male issue of the said Peter Butler, Earl of Ossory and Ormonde.

The evidence given as to the value of the reversion claimed by the Crown is referred to in the judgment of Wylie, J.

Ronan, K.C., and *E. S. Murphy*, for the vendor.

The Attorney-General (*J. F. Moriarty, K.C.*), and *M. G. Longfield*, for the Commissioners of Woods and Forests.

The arguments were similar to those reported in the Court of Appeal, *post*, p. 101.

Cur. adv. vult.

June 24.

WYLIE, J.:—

In this case the vendor has applied for an order that the reversion claimed by the Crown in respect of the lands sold herein be redeemed, and the redemption price thereof fixed. The lands sold are not charged with any quit or Crown rent, but are part of the manor of Arklow granted, with other lands, by a patent of Henry 8, to Peter Butler, Earl of Ormonde, and his eldest son, and to the heirs male of Peter for ever; and the Crown now claims the value of the reversion expectant on the determination of that grant.

The question of the redemption of this reversion in respect of other lands held under the same patent came before my predecessor, Meredith, J., in *In re Fischer's Estate* (1), and in that case it was held that this reversion was not within sect. 31 of the Act of 1896, and that the redemption of it could only be carried out under sect. 68 of the Landed Estates Court Act, with the consent of the Crown.

By sect. 98 of the Act of 1903, it was enacted that "the expression 'superior interest' in the Land Purchase Acts shall include any reversion or estate expectant on the determination of an estate tail or a base fee, whether such reversion or estate is or is not vested in the Crown." The plain effect of that

(1) [1901] 1 I. R. 377.

Wylie, J. 1913.

In re EARL OF CARYSFORT'S ESTATE.

enactment was to make such a reversion a "superior interest" within sect. 31 of the Act of 1896, and subject to all the provisions of that section applicable to a superior interest. It is of course also a superior interest within sects. 16 of the Act of 1887, and 64 of the Act of 1903. Now sect. 31, sub-sect. 5, of the Act of 1896 provides that "the price or compensation to be paid in respect of a superior interest . . . shall be determined in the manner provided by the said sections for the redemption of annuities, rentcharges, and rents: Provided that, if the Court are of opinion that any such superior interest is of no appreciable value to the persons entitled thereto, the purchase-money of the land may be distributed without regard to such superior interest."

Now, the manner provided for the redemption of annuities, rentcharges, and rents was prescribed by sect. 16, sub-sect. 3, of the Act of 1887. Then sect. 64 of the Act of 1903 provides that, notwithstanding anything in sect. 16, sub-sect. 3, of the Act of 1887, if the parties do not agree upon the redemption price of a superior interest, that price shall be determined by the Judicial Commissioner or the Land Judge, as the case may be. Therefore it would seem to me to follow that, if the parties do not agree to the price of a Crown reversion, the price is to be fixed by the Court.

But counsel for the Crown, though admitting that the Court can redeem a Crown reversion without the consent of the Crown, contend that it cannot fix the price without such consent. This contention is based on sect. 60 of 10 Geo. 4, c. 50, which provides that no sale or purchase of Crown property (except where the purchase-money does not exceed £100) shall be made by the Commissioners of Woods under the powers of the Act without the previous authority of the Treasury. But the compulsory redemption of a superior interest under the Land Purchase Acts is not a sale or purchase by the Commissioners of Woods under 10 Geo. 4. Therefore it would seem to me that sect. 60 of that Act has no application to this case. I am relieved, however, from any difficulty on this point, because it has been expressly decided by my predecessor in *In re Paul's Estate* (1). In that

(1) 40 I. L. T. R. 23.

case the lands sold were held under the same patent, and on the application by the vendor to redeem and fix the redemption price of the Crown reversion, Meredith, J., in giving judgment, says:—"The controlling power of the Crown which had existed when *Fischer's Estate* (1) was decided was taken away by the Irish Land Act, 1903, and the Commissioners of Woods can no longer refuse to consent except on their own terms to the redemption of Crown reversions in the case of the Ormonde Estate." That decision I would, of course, follow in this case, even if I had some doubt as to its correctness, which I have not.

The more difficult question, however, remains as to the price. It is admitted that there is no quit or Crown rent payable out of the lands, and that the Crown does not, and will not, receive any income therefrom so long as there exists any heir male of Peter Butler, Earl of Ormonde. It is also admitted that there at present exist at least seventeen heirs male of the said Earl, and therefore the contingency of no such heir male existing cannot in all human probability arise until a very remote period.

In this state of facts a number of affidavits as to the value of this reversion have been filed on both sides. Mr. Scaife proves that prior to 1903, when Crown property could not be sold or purchased without the consent of the Crown, the price fixed by the Treasury for a reversion such as this was one per cent. on the fee-simple value of the property, and that this was based upon the advice of a Mr. Smith, an experienced valuer, who considered that the probability of the failure of heirs male was of comparatively little importance as an element of value, the main element being the conversion of a terminable estate into a perpetuity. Affidavits have also been filed on behalf of the Crown, made by Sir John Barton, Mr. Bennett, and Mr. Battersby, valuing on the same lines as Mr. Smith, and all agreeing that if the fee were offered for sale free from this contingent reversion, it would realize a price more by one quarter of a year's rent than if offered subject to such a contingency, no matter how remote.

(1) [1901] 1 I. R. 377.

Wylie, J. 1913.

In re EARL OF CARYSFORT'S ESTATE.

The valuations, therefore, put forward on behalf of the Crown are based, not on the value of the reversion to the owner of it, but on its value to the person buying it.

This principle of valuation Mr. Ronan, on behalf of the vendor, disputes, and contends that the proper principle of valuation in cases of compulsory purchase is to ascertain the value of the property to the owner of it. This would seem to be in accordance with the proviso, already referred to in sect. 31, sub-sect. 5, of the Act of 1896, which says that, if the Court are of opinion that any such superior interest is of no appreciable value to the persons entitled thereto, the purchase-money may be distributed without regard to such superior interest. It is also in accordance with the rule laid down by the Court of Appeal for fixing the redemption price of superior rents—viz., to fix such a sum as, when invested, would produce an equal income equally well secured. Mr. Ronan accordingly contends that the only way to ascertain the value of a reversion like this to the owner is to find what it would bring in the market, and evidence has been given that it would bring nothing in the market. This, I think, could hardly be disputed. Evidence by actuarial valuation has also been given, the practical result of which is, that this reversion is of no appreciable value.

In *In re Kirkwood's Estate* (1), Ross, J., held that a reversion expectant on the determination of a term of 900 years from 1710 was of no appreciable value. I presume that was on the ground that at present it had no market value. I am not sure, however, that the principle of present market value applies to the Crown to the same extent that it does to a private owner, because the King never dies, and a reversionary interest in a valuable property, that would not fall in for some hundreds of years, might very well be regarded as of no appreciable value to a private person, and yet be of some value to the Crown that has perpetual succession.

Be that as it may, however, the question now before me has been actually decided by my predecessor, Meredith, J., in *In re Paul's Estate* (2), already referred to. The lands were held under

(1) Not reported.

(2) 40 I. L. T. R. 23.

Wylie, J.
1913.

In re EARL OF CARYSFORT'S ESTATE.

the same patent, and substantially the same facts were proved, and evidence of value given, in that case as in this, and the learned Judge, in giving judgment, repeated what he had said in *In re Fischer's Estate* (1)—viz., that he was satisfied from the statement made to him by the representatives of the Crown that the price demanded on behalf of the Crown was not an artificial or fancy price ascertained at the pleasure of the particular officer in charge of the Crown rent office, but that it was fixed upon a scale laid down in a valuation obtained by the Treasury for the guidance of the department having charge of the interests of the Crown in these matters. Then he says, "it might be an easy way out of the difficult task set me if I were to split the difference between the various estimates; but I decline to take that course. The property is either worth nothing, or it is worth what is claimed by the Crown"; and he fixed the price at one per cent., as claimed by the Crown.

Mr. Ronan contends that I am not in any way bound to follow that decision, as the question of value is one of fact and not of law. Technically that may be so, but it is really more a question of principle applied to the same state of facts. Under all the circumstances of the case, I am unable to say that in my judgment the decision in *In re Paul's Estate* (2) was wrong. Therefore, I think I ought to follow it, and I accordingly fix the redemption price at one per cent. on the purchase-money.

J. E. W.

Appeal.
1913.

The vendor appealed to the Court of Appeal (3).

D. S. Henry, K.C., and *E. S. Murphy*, for the appellant :—

The Crown reversion in the lands sold was valueless, and the purchase-money should be distributed without regard thereto, whether the Crown consents or not. Under sub-sect. 5 of s. 31 of the Land Law (Ireland) Act, 1896, there is power in the Land

(1) [1901] 1 I. R. 377.

(2) 40 I. L. T. R. 28.

(3) In the Court of Appeal before O'BRIEN, L.C., and HOLMES and CHERRY, L.JJ.

Appeal. 1913.

In re EARL OF CARYSFORT'S ESTATE.

Commission so to distribute without regard to a superior interest which is valueless. In *In re Fischer's Estate* (1) it was held by Meredith, J., that a Crown reversion did not come within sect. 31 of the Act of 1896, and that the redemption of such a reversion could only be carried out with the consent of the Crown. This decision led to the extension of the definition of "superior interest" in sub-sect. 2 of sect. 98 of the Act of 1903; and "superior interest" now includes "any reversion or estate expectant on the determination of an estate tail or a base fee, whether such reversion or estate is or is not vested in the Crown." See *Paul's Estate* (2). This sub-section would be rendered inoperative if the contention of the Crown be correct. It was never intended that the prohibition against redemption without the consent of the Crown, contained in sect. 15 of the Act of 1887, should be continued into the latter sections; and sects. 15 and 16 of the Act of 1887 are only mentioned in sect. 31 of the Act of 1896 for the purpose of introducing the machinery of these sections.

As to the value of the reversion, we submit that, having regard to the number of lives intervening, there is no market value; and that, as regards this, there is no difference between the Crown and an individual owner.

The Solicitor-General (*Jonathan Pim, K.C.*), with him *The Attorney-General* (*J. F. Moriarty, K.C.*), and *M. G. Longfield*, for the respondents:—

The reversion cannot be redeemed without the consent of the Crown, whose rights are strictly preserved throughout the entire land code. Sect. 60 of 10 Geo. 4, c. 50, enacts that no purchase or sale (except when the purchase-money does not exceed £100) shall be made under the powers of that Act without the previous authority of the Treasury, signified by warrant. This section is still operative in cases not under the Irish Land Purchase Acts. Sect. 68 of the Landed Estates Court Act of 1858 empowered the Court to apportion Crown-rent upon the several lands liable to the payment thereof, but only with the consent in

(1) [1901] 1 I. R. 377.

(2) 40 I. L. T. R. 23.

writing of the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, and without prejudice to any reversion or remainder of the Crown in the lands originally charged with any such rent. The latter section was incorporated with the Land Purchase code by sect. 10 of the Purchase of Land (Ireland) Act, 1885. Then follow sects. 15 and 16 of the Land Law (Ireland) Act, 1887; sect. 15 dealing with the rights of the Crown, and sect. 16 with those of the subject. By sub-sect. 3 of s. 15, the apportionment or redemption of Crown or quit-rent provided for by the said section is expressly prohibited without the previous consent of the Commissioners of Her Majesty's Woods, Forests, and Land Revenues. Sect. 64 of the Irish Land Act, 1903, which is substituted for the latter portion of sect. 16 of the Act of 1887, and which empowers the Judicial Commissioner or Land Judge, in the absence of agreement between the parties, to determine the redemption price of a superior interest, leaves sect. 15 of the Act of 1887 untouched; and as, under sub-sect. 5 of s. 31 of the Land Law (Ireland) Act, 1896, the price to be paid in respect of a superior interest extinguished under the said section is to be determined "in the manner provided by the said sections for the redemption of annuities, rentcharges, and rents," "the said sections," including sect. 15 of the Act of 1887, the necessity for obtaining the consent of the Crown, provided for by sect. 15 of the Act of 1887, must be carried over into sect. 31 of the Act of 1896, even having regard to the definition of "superior interest" in sub-s. 2 of sect. 98 of the Irish Land Act, 1903.

This reversion, in the hands of a private individual, might have little or no market value; but as the interest of the Crown is perpetual, there is a much greater chance of the reversion falling in, in the case of the Crown, than there would be in the case of an individual, and there is nothing unreasonable in fixing the redemption price of the reversion at the rate of 1 per cent. of the purchase-money.

[*Re Close's Estate* (1), and *Re Murphy's Estate* (2), were also cited.]

(1) [1905] 1 I. R. 207, 371. (2) 54 I. L. T. R. 42.

Appeal.
1913.

In re EARL OF CARYSFORT'S ESTATE.

O'BRIEN, L.C. :—

This appeal involves two questions, one of general importance, and the other only of importance as regards this particular estate. It comes before the Court on appeal from a decision of Mr. Justice Wylie, by which he fixed a redemption price, calculated at the rate of 1 per cent. of the purchase-money, in respect of the reversionary interest of the Crown under a reversion created in the manner I shall afterwards refer to; the amount involved is over £2000, so that the matter is one substantially affecting this estate.

It appears that the Crown in the reign of Henry VIII made a grant to Peter Butler and his male heirs for ever of this Ormonde estate, which is a very valuable estate, now in the process of being sold to the tenants under the Land Purchase Acts. The present position is that there are at least seventeen male issue of Peter Butler living, so that the possibility of the line of Peter Butler becoming extinct in any reasonable time is remote.

The purchase having been carried out in the ordinary way, the Crown has now raised the objection that the reversion of the Crown cannot be redeemed against the will of the Crown, and that if the redemption price is to be fixed, the amount of it will depend, not on the determination of the Judge who is to perform the operation of valuation in other cases, but on the will of the Crown itself. I do not for a moment suggest that the will of the Crown would be exercised in an arbitrary or unfair manner; I only point this out to show the nature of the net question we have to decide, because if the Crown has got a will in the matter, it has expressed its will by assenting to the figure of 1 per cent., and there would be an end of the matter unless the contention of the owner of the Ormonde estate is accurate.

It was decided beyond all question in *Fischer's Estate* (1) that as the law stood prior to 1903, the Crown was not bound under circumstances similar to the present. In sub-sect. 8 of sect. 31 of the Land Act of 1896, the Crown was expressly named for a particular purpose; it was not named in respect of reversions in

(1) [1901] 1 I. R. 377.

the Crown expectant on the determination of an estate tail or base fee. Subsequent to the decision in *Fischer's Estate*, namely, in 1903, an Act of Parliament was passed (The Irish Land Act, 1903), which, by sub-sect. 2 of its 98th section, has the effect of expressly incorporating with sect. 31, sub-sect. 8, of the Act of 1896 the further words which bind the Crown, to the extent we shall see hereafter. That sub-sect. enacts that "The expression 'superior interest' in the Land Purchase Acts shall include any reversion or estate expectant on the determination of an estate tail or a base fee, whether such reversion or estate is or is not vested in the Crown."

Therefore what we have here to deal with is not a matter of implication, but one of express legislation, which was enacted to carry out a particular object, namely, that when an estate expectant on the determination of an estate limited to a man and his heirs male is vested in the Crown, it should be redeemable at a price, if it has a price, to be paid out of the purchase-money; and if it has not any appreciable value, it may be disregarded, just as if it were an estate vested in a private individual.

The argument of the Crown, as I understand it, is this, that under sections 15 and 16 of the Land Act of 1887, which are the foundations of this jurisdiction to redeem, certain exclusions are contained, which are now carried over, so to speak, into section 31 of the Act of 1896, even as amended by the Act of 1903, enabling the Crown to take up the position it has adopted in the present case.

Section 15 of the Act of 1887 dealt with the subject-matter of Crown rent, quit rent, or tithe-rentcharge, and by sub-sect. 2 it was enacted that "the Land Commission may, if they think it expedient, order the redemption of any Crown rent, quit rent, or tithe-rentcharge, or any apportioned part thereof, at a price to be fixed by the Land Commission," but subject to the qualification that, in dealing with such Crown or quit rents as are referred to, no apportionment or redemption should be made without the previous consent of the Commissioners of Her Majesty's Woods, Forests, and Land Revenues.

(1) [1901] 1 I. R. 377.

Appeal. 1913. *In re* EARL OF CARYSFORT'S ESTATE. O'Brien, L.C.

Section 16 of the same Act dealt with a somewhat different description of property; sub-section 1 provides that "When any land sold under the Land Law (Ireland) Acts is subject with other lands to any annuity or rent-charge, the Land Commission may, if they think it expedient, by order apportion the same as between such land and the other lands subject thereto, and thereupon such part of the annuity or rentcharge as is apportioned on the land to be sold shall alone be deemed to be the annuity or rentcharge chargeable on such land"; and sub-sect. 3 empowers the Land Commission, on the application of the person entitled to a part of an annuity, rentcharge, or rent which has been apportioned upon land sold, or, if they think it expedient, without such application, to order the redemption of such annuity, rentcharge, or rent or of an apportioned part thereof.

No question would arise as to whether or not the Crown was bound in a case like the present by that statute as it stood, the power to redeem having been confined practically to cases where the Court had at first apportioned those charges, which at this date, and down to the Act of 1896, were, strictly speaking, *charges* as distinct from *estates*. This power was extended by sect. 31 of the Act of 1896 by a method of legislation not quite happy perhaps, but effective for its purpose.

It was considered necessary that in addition to this power to redeem mere regular payments in money, there should be power to redeem certain subject-matters which were technically estates, including estates expectant on the determination of limitations in tail male. To accomplish this, sub-sect. 3 provided that "the powers of apportionment and redemption given to the Land Commission by sect. 10 of the Purchase of Land (Ireland) Act, 1885, and sects. 15 and 16 of the Land Law (Ireland) Act, 1887, shall extend to superior interests, and be exercised in such manner as shall appear equitable, and shall not be limited to an apportionment between the land sold and the residue of the land subject to the superior interest"; and the expression "superior interest" is defined by sub-sect. 8 to include "any rent, rentcharge, annuity, fees, duties, or services payable or to be rendered in respect of the land sold to any person, including Her Majesty and her successors, and any estates, exceptions, reservations,

covenants, conditions, or agreements, contained in any fee-farm grant, or other conveyance in fee, or lease, under which such land is held, and if such land is held under a lease for lives or years renewable for ever, or for a term of years of which not less than sixty are unexpired at the date of the sale, shall include any reversion or estate expectant on the determination of such lease or expiration of such term, and notwithstanding that such reversion or estate may be vested in Her Majesty and her successors."

Now, it had been decided that sect. 31 did not extend to the case of an estate tail in land, when the reversion was in the Crown. Then the Irish Land Act of 1903, sect. 98, provided that the expression "superior interest" should include any reversion or estate expectant on the determination of an estate tail or a base fee, whether such reversion or estate is or is not vested in the Crown. At first sight this would seem to bring the Crown within the sections of the compulsory powers of redemption, including the fixing of the price; and this view was beyond doubt largely entertained at the Bar until the question was raised in the present case.

It is argued by counsel for the Crown that because sect. 15 of the Act of 1887 contains, with reference to the redemption of Crown rents, quit rents, and tithe-rentcharges, a certain limitation, not expressly repealed, for the protection of the Crown, therefore as the words of sub-sect. 5 of sect. 31 of the Act of 1896 provide that the price or compensation to be paid in respect of a superior interest, or of any apportioned part thereof, shall be determined "in the manner provided *by the said sections*" for the redemption of annuities, &c., we are not only to bring over sect. 15 and sect. 16 of the Act of 1887, but also to project into sect. 16 when reading it with sect. 31 of the Act of 1896, as amended by the Act of 1903, this limitation inserted for the protection of the Crown in sect. 15, but absent from sect. 16.

To my mind the whole of that argument, if it has any force at all, must depend on the use of the word "sections," in the plural, in sect. 31. I see no other justification for it.

In my judgment the words "the said sections" must be read distributively. The intention of the legislation was to introduce

Appeal. 1913.

In re EARL OF ARYSFORT'S ESTATE.

Brien, L.C.

the machinery of both sects. 15 and 16, but these words certainly do not, to my mind, bind the Court to hold that it is necessary to project from sect. 15 of the Act of 1887 a prohibition with regard to the redemption of Crown interests, and introduce that prohibition into the later legislation, so as actually to restrict the express terms of the definition clause of the Land Act of 1903. Of course the Crown are fully entitled to press the view, extraordinary though it may seem, that an Act of Parliament which everyone knows was intended to remedy a particular condition of things did not remedy it, and that the language used was ineffective for its purpose; but, to my mind, it is sufficient to say that on reading sect. 31 of the Act of 1896 plus the definition section of the Act of 1903, plus section 16 of the Act of 1887, I cannot conceive a construction which can be reasonably placed on these sections, and which would not bind the Crown, not by implication, but by the clearest language of the Legislature.

That is my view; it decides the general question argued in the present case, and I now come to a matter which is only of importance in the present case.

If I am right in my view of this case, the whole of sect. 31 of the Act of 1896 must apply to the Crown, including the latter portion of sub-sect. 5, which enacts as follows:—

"Provided that if the Court are of opinion that any such superior interest is of no appreciable value to the persons entitled thereto, the purchase-money of the land may be distributed without regard to such superior interest."

It is contended in the present case that there is no such appreciable value in this Crown reversion, and, speaking for myself, I accede to this contention. The first thing which must be remembered is, that the value of the interest is the value to the person or persons entitled thereto, *i.e.*, the owner of the superior interest. The owner in this case is the Crown; and it has been suggested that there is some difference between the case of the Crown and that of a private individual, as regards the redemption of such an interest as this. I cannot agree with this suggestion. What has to be ascertained is the market value of the particular thing at the time of redemption, and it is the market value to the person entitled thereto. If the chance of succession

is dependent on the dropping of a number of lives, the "present value" must, it seems to me, be the same, whether the owner be the Crown or a private individual. In the present case there are seventeen lives intervening between the owner and the possibility of any succession by the Crown, and an actuarial valuation of such a reversion only affirms in a quasi-scientific way the view which any person of common sense would adopt, namely, that the reversion is of no appreciable value. The value is the net market value in the ordinary sense, and the learned Solicitor-General has admitted that, so far as an actuarial basis is concerned, he is unable to suggest a value; but he says that we are to assume a value, and place a redemption-price upon it of 1 per cent. of the purchase-money. I cannot see why we should do so, or why we should allow even one farthing per cent., when all common sense shows that there is nothing of appreciable value at the present time.

That being so, I think that the case ought to go back to the learned Judge with an expression of our opinion that there is no evidence in this case of any appreciable value. That will not decide that in other cases where there might be, for instance, only one intervening life, or other circumstances differentiating the case from the present, there may not be an appreciable value in a Crown reversion. I only decide that, in this particular case, there is no appreciable value; and in that view the case ought to be remitted to the learned Judge.

I must add this: I do not read the judgment of Mr. Justice Wylie as suggesting that he thought this reversion had any appreciable value, but that as there was a previous adjudication giving 1 per cent., he ought to follow it, and allow that amount. The general trend of his judgment, however, leads to the same conclusion as my own.

HOLMES, L.J.:—

I agree. We have heard an argument from the Solicitor-General which might have been addressed to Mr. Justice Meredith in *Paul's Estate* (1), to the effect that a provision introduced into the Irish Land Act, 1903, evidently for the purpose of correcting, as one might say, or altering, a decision given by Mr. Justice

(1) 40 I. L. T. R. 23.

Appeal 1913.

In re EARL OF CARYSFORT'S ESTATE.

Holmes, L.J.

Meredith two years before in *Fischer's Estate* (1), had not the effect which I think the Legislature intended it to have. In *Paul's Estate* (2) Mr. Justice Meredith held that it had that effect, and it seems to me impossible to place upon the language used in the Act any other construction.

So far as that point is concerned I agree with the conclusion arrived at by Mr. Justice Wylie, he having followed the judgment in *Paul's Estate* (2).

Then comes another question, the view as to which taken by Mr. Justice Wylie I do not quite understand. I was disposed to think during the argument that he was of opinion that although the reversion had no appreciable value in the hands of the Crown, still, by a kind of practice or understanding in the case of this and other estates similarly situated, a certain fixed percentage on the amount of the purchase-money was fixed by his Court as payable to the Crown. If that be the view taken by Mr. Justice Wylie, I cannot agree with it. I find that he states:—"Mr. Ronan accordingly contends that the only way to ascertain the value of a reversion like this to the owner is to find what it would bring in the market, and evidence has been given that it would bring nothing in the market. This, I think, could hardly be disputed. Evidence by actuarial valuation has also been given, the practical result of which is that this reversion is of no appreciable value."

That is a statement made by the learned Judge that this reversion has no value, either appreciable or ascertainable by any actuarial valuation, and, under these circumstances, it would seem to me to follow from the provisions of sect. 31 of the Act of 1896, to which our attention has been called, that no value should have been placed upon it by the learned Judge. I think that the result of our decision will be that he will take that view.

CHERRY, L.J., concurred.

Solicitors for the vendor; *H. & W. Stanley.*
Solicitor for the Crown: *William Fry.*

R. ST. J. C.

(1) [1901] 1 I. R. 377. (2) 40 I. L. T. R. 23.

In re TAYLOR, Deceased.

SHAW *v.* SHAW.

Barton, J.
1913.
Dec. 1.

Will—Construction—Devise—Property neither to be mortgaged nor sold—Life interest—Married woman—Restraint on anticipation.

A testator by his will devised certain houses, held under a lease for lives renewable for ever, to M. for her sole use, neither to be mortgaged nor sold, and at her demise to descend to her next-of-kin, and neither to be mortgaged nor sold as long as the lease of the said houses should last.

Held, that M. took only a life interest for her separate use, with a restraint on anticipation during coverture.

Originating Summons.

The question raised by the originating summons was as to the true construction of the following devise in the will, dated the 22nd day of February, 1860, of Robert Taylor, deceased, who died on the 21st day of May, 1861 :—"I will, devise, and bequeath to my beloved daughter, Margaret Taylor, *alias* Shaw, all those two dwelling-houses, together with the appurtenances thereto belonging, situate and numbered respectively 75 and 77 Joy Street, Belfast, for her sole use, said houses neither to be mortgaged nor sold, and at her demise to descend to her next-of-kin, and neither to be mortgaged nor sold as long as the lease of the said houses shall last."

Margaret Shaw was a married woman at the date of the will and of the testator's death. The houses in question were held under a lease for lives renewable for ever.

M'Gonigal, K.C., for the plaintiff, Margaret Shaw :—

The question for decision is, whether the plaintiff, Margaret Shaw, takes an absolute estate under the will. The testator bequeathed to her the two houses "for her sole use, said houses to be neither mortgaged nor sold, and at her demise to descend to her

Barton, J. 1913. SHAW v. SHAW.

next-of-kin, and neither be mortgaged nor sold as long as the lease of the said houses shall last." The intention of the testator was to give the plaintiff an absolute estate; to accomplish this he gave the property "for her sole use." The words "said houses to be neither mortgaged nor sold," &c., were appended to the absolute gift. These words are incompatible and inconsistent with the absolute gift already given, and cannot have any effect in reducing the absolute gift to a life interest.

J. H. Dixon, for the defendant:—

The Court has no power to make a will for the testator, and the intention of the latter must be gathered from the words used in the will. The testator did not give the plaintiff an absolute estate. The words of the will are "for her sole use, said houses neither to be mortgaged nor sold, and at her demise to descend to her next-of-kin, and neither to be mortgaged nor sold as long as the lease of the said houses shall last." His intention was to preserve the *corpus* of the gift for her next-of-kin. With this in view he created for her a separate estate for her life, with a restraint on anticipation. This preserved the interest of both the plaintiff and the next-of-kin. *Steedman* v. *Poole* (1) is a case in point, and is in my favour. A direction that there may be no sale or mortgage of property devised during the life of the devisee amounts to a restraint on anticipation: *Goulder* v. *Camm* (2). *Re Hutchings to Burt* (3) is distinguishable.

BARTON, J.:—

The plaintiff does not, in my opinion, take an absolute interest, but an estate for life. As the devise and bequest was to a daughter, who, at the date of the will and at the date of the testator's death, was a married woman, the words "for her sole use" show an intention to exclude her husband, and effect is given to that intention by holding the gift to be for her separate use. The direction in the will that there was to be no mortgage or sale of

(1) 6 Hare 193.
(2) 1 De G. F. & J. 146.
(3) 59 L. T. 490.

the property during the life of the plaintiff amounts to a restraint on anticipation. In that respect the terms of this devise are similar to those in *Steedman* v. *Poole* (1). Accordingly, I hold that the plaintiff takes an estate for life for her separate use, with a restraint upon anticipation during coverture.

Barton, J. 1913.

SHAW *v.* SHAW

Solicitor for the plaintiff: *David M'Gonigal.*
Solicitor for the defendant: *Francis Kerr.*

R. W. L.

CONDON *v.* MITCHELSTOWN RURAL DISTRICT COUNCIL.

Ross, J. 1913.

June 12, 13.

Appeal. Dec. 18.

Local Government—Labourers (Ireland) Acts—Improvement scheme founded on representation on behalf of agricultural labourer—Right of such labourer to preference on first letting of particular cottage—Labourers (Ireland) Act, 1906 (6 *Edw.* 7, *c.* 37), *s.* 29.

Representations under the Labourers (Ireland) Acts were, on behalf of certain labourers, made to a district council, representing that there were not sufficient houses in certain electoral divisions, and suggesting the building of cottages for the labourers mentioned in the representations. One of these representations was made on behalf of the plaintiff, and suggested the building of a cottage on a site in the townland of B. The council thereupon made a scheme, in pursuance of which they acquired a plot in the townland of B. and built ten cottages thereon. Under the same scheme they also acquired other plots in an adjoining townland and erected cottages thereon. The council had made regulations under sect. 29 of the Labourers Act, 1906, providing for a preference on the first letting of cottages comprised in the scheme to be given to labourers who had signed the representation on which the scheme was founded.

Held by the Court of Appeal (affirming the decision of Ross, J.), that the plaintiff, assuming that he had a right of preference to some one of the cottages included in the scheme, was not entitled to a preferential right to a particular cottage, or to one of the particular cottages erected on the townland specified in the representation signed by him.

(1) 6 Hare, 193.

Ross, J.
1913.

CONDON
v.
MITCHELS-
TOWN RURAL
DISTRICT
COUNCIL.

TRIAL OF ACTION.

The defendants had framed an improvement scheme (subsequently duly confirmed) under the Labourers (Ireland) Acts, to acquire certain plots of land, and build cottages thereon. The plaintiff was an agricultural labourer, and one of the representations on which the scheme was founded was made on his behalf. This representation was as follows:—

LABOURERS (IRELAND) ACTS, 1883 TO 1906.

REPRESENTATION.

(Cottages to be built in substitution for insanitary dwellings.)

Mitchelstown Rural District No. 1.

Mitchelstown District Electoral Division.

We the undersigned, being agricultural labourers or ratepayers, represent that the under-mentioned labourers are living in houses which are unfit for human habitation, and should be provided with suitable house-accommodation, and that it is the duty of the district council to take proceedings under the Labourers Acts for the making of an improvement scheme in respect of the above-named electoral division.

We suggest that cottages should be built in lieu of these dwellings on the holdings named in the Schedule set out below, and that suitable plots should be attached thereto.

Signatures.	Addresses.
1. James Finn, . .	Mitchelstown.
2. Patrick Russell, .	,,
3. William Roche, .	,,

SCHEDULE.

Name of Labourer.	Address.	Occupiers where sites are proposed.	Townland.
Maurice Condon.	Mitchelstown.	Countess of Kingston.	Ballinwillin.

The defendants acquired, under the scheme, a plot of land in the townland of Ballinwillin, in the occupation of the Countess of Kingston, containing 1A. 1R. 28P. (described as plot No. 41),

upon which they built ten cottages. They also under the same scheme acquired a plot of land in the adjoining townland of Brigown, in respect of which a representation had been lodged in Form 1 of the Forms in the Schedule to the Labourers (Ireland) Order, 1906, suggesting the building of a cottage thereon for an agricultural labourer named Michael Doolan.

Regulations had been made by the defendants pursuant to sect. 29 of the Labourers Act, 1906, in the form suggested by the Local Government Board (see Bolton's Labourers Acts, vol. ii, p. 233), and had been confirmed by the Local Government Board on December 14th, 1910. The second of these regulations provided that on the first letting of any cottages or allotments comprised in the scheme, preference should be given to agricultural labourers who had signed on their own behalf the representation on which the scheme was founded, or on whose behalf that representation was made, unless the applicant had in the meantime ceased to be an agricultural labourer.

The plaintiff, in his statement of claim, alleged that the defendants had acquired a plot of land in respect of which his representation was made, and erected a cottage thereon, and claimed that he was, by virtue of the said representation, and the provisions of sect. 29, sub-s. 2, of the Labourers Act, 1906, entitled to be preferred as tenant by the defendants on the first letting of "the said plot and cottage," and to be put into possession thereof as tenant to the defendants; that the defendants neglected and refused to put plaintiff in possession of the said plot of land and cottage as such tenant, and let the same to one Michael Doolan, by whom no representation was made in respect of the said plot and cottage. The plaintiff claimed: (*a*) a declaration that he was entitled to be preferred as tenant on the first letting of the said plot and cottage, and to be given possession; (*b*) an injunction to restrain the defendants from letting or continuing to let said plot and cottage to any person other than the plaintiff; (*c*) an injunction to compel defendants to put the plaintiff into possession of said plot and cottage as tenant to defendants; and (*d*) damages.

The defendants by their defence pleaded that they had made a scheme under the Labourers Acts, and acquired a plot of land

Ross, J.
1913.

CONDON v. MITCHELSTOWN RURAL DISTRICT COUNCIL.

at Ballinwillin, containing 1A. 1R. 28P., upon which they built ten cottages; that no special portion of this plot was indicated by the plaintiff in the representation signed on his behalf, and that he was not entitled to claim any preference in respect of the cottage, now let by the defendants to the agricultural labourer Michael Doolan; that the defendants had under the same scheme also acquired lands in the townland of Brigown, adjoining Ballinwillin, and had built eleven cottages thereon; and, without admitting any liability, defendants had offered the plaintiff, and still continued to offer him, and were willing to let to him, a cottage and plot at Brigown. They denied that the plaintiff was entitled to be preferred by the defendants in the first letting of the cottage and plot now let to Michael Doolan, or to be put into possession of same.

At the trial the plaintiff was allowed to amend his statement of claim. The claim as amended was as follows:—"Plaintiff is entitled to be preferred as tenant of a cottage upon the first letting of the cottages erected by the defendants on plot No. 41, included in 'The Mitchelstown, No. 1, Rural District Order, 1910,' and to be given possession of such cottage as tenant to the defendants."

P. D. Fleming, K.C. (with him *Rearden*), for the plaintiff:—

The scheme promoted by the defendants for the purpose of acquiring plots of lands and building labourers' cottages thereon was founded on a representation signed on behalf of the plaintiff. Therefore the plaintiff is entitled to a preference on the first letting of one of the cottages on plot 41, to which plot the representation referred: *R.* (*Ferguson*) v. *Lurgan Rural District Council* (1); *R.* (*Ryan*) v. *Recorder of Cork* (2). [He also referred to sects. 4 and 5 of the Labourers Act, 1883; sect. 3, Labourers Act, 1891; sects. 93, 94, and 97, Irish Land Act, 1903; sects. 1 and 6, Labourers Act, 1906; Rules 4-12 and Forms 1-7 Labourers (Ireland) Order, 1906.]

Serjeant M'Sweeny, K.C., and *H. D. Conner, K.C.* (with them *D. F. Condon*), for the defendants:—

A scheme gives a person named no legal right. He has

(1) 47 I. L. T. R. 31. (2) [1913] 2 I. R. 241.

merely a preference, but that does not give him the right to a cottage on a particular plot. A labourer has no more interest entitling him to bring an action than a pauper in a workhouse has under the dietary rules of the poor law guardians. The plaintiff could have applied to the Local Government Board under sect. 15 of the Public Health Act, 1896. Defendants acted *bona fide* in selecting tenants, and exercised their discretion without any undue preference. Michael Doolan, to whom the first letting was made, had also lodged a representation on which the scheme was founded.

Rearden, in reply.

Ross, J.:—

I have been informed that there is a case at hearing in the King's Bench Division in which similar questions are involved (1). In the ordinary course I should wait for judgment in that case, but in the view I take of the present case it is not necessary for me to do so.

I come to the consideration of the questions arising under sect. 29 of the Labourers Act, 1906. That section enacts that the district council shall make regulations with respect to the letting of cottages. The section is mandatory. They must make these regulations, and an agricultural labourer has the right to require them to make these regulations. It was so held by the King's Bench Division in *Rex.* (*Ferguson*) v. *Lurgan Rural District Council* (2). The regulations which they are required to make are intended to prevent partisanship from taking any effect. They are to contain a schedule of rents. That is to prevent the guardians from giving a cottage to the labourer who would pay the highest rent. In this case there is no doubt that Condon sent in a representation on which an improvement scheme was founded. The word "preference," used in sect. 29 of the Act of 1906, must mean something. I take it to mean this, that when you have cottages under a scheme, with a fixed rent, the man who sends in the representation is to have the first offer of a cottage at

(1) *Tevlin* v. *Lisnaskea Rural District Council*, now reported [1914] 2 I. R. 15.

(2) 47 I. L. T. R. 31.

Ross, J. 1913. CONDON v. MITCHELSTOWN RURAL DISTRICT COUNCIL.

the fixed rent. It is not now contended that the plaintiff can get the particular cottage on plot 41, as claimed by him in the writ. I have allowed an amendment of the statement of claim; I am asked to make no further amendment. He now claims one of the cottages on plot 41. The question I have to decide is, whether he is entitled to a cottage on that particular plot. I have to deal with the actual words used by the Legislature. [His Lordship read sect. 29, sub-s. 2, of the Act of 1906.] What is there in this section to show that the preference is to be exercised on the particular plot the labourer had in view when he made the representation? I am told that Condon has been offered a cottage on plot 42, Brigown, not far distant from the first plot, and comprised in the same improvement scheme. I decide nothing as to Brigown. I am of opinion that there is nothing to compel his preference being given effect to in plot 41. It is a matter of importance that labourers should be kept in the country. Parliament has provided money. The administration has been entrusted to local authorities who have not got unlimited discretion, but they must not be embarrassed by loose interpretation of the statute. Assuming that the plaintiff has a right of preference to some one of the cottages in the scheme, I decide that he has no claim as of right to one of the cottages erected on this particular plot, namely to one of the cottages on plot No. 41 of the scheme. The action must be dismissed.

D. M. S.

Appeal. 1913. Dec. 18.

The plaintiff appealed to the Court of Appeal (1).

P. D. Fleming, K.C., and *Rearden*, for the appellant:—

The right the plaintiff seeks to enforce in this action is a preferential right, not to any particular cottage, but to one of the ten cottages erected in the townland referred to in the representation signed by him. We submit that sect. 29 of the Labourers (Ireland) Act, 1906, in express terms gives a preferential right to the plaintiff on the first letting of these cottages. The plaintiff cannot be deprived of that right by the offer of another cottage

(1) In the Court of Appeal, before O'BRIEN, L.C., and HOLMES and CHERRY, L.JJ.

erected on other lands, merely because the council, for its own purposes, has included in one scheme a number of representations relating to different townlands. In any case the offer made was illusory, and the cottage offered unsuitable for the plaintiff [They referred to *Tevlin* v. *Lisnaskea Rural District Council* (1); *R.* (*Ferguson*) v. *Lurgan Rural District Council* (2).]

Serjeant M'Sweeney, K.C., Norwood, K.C., and *D. F. Condon, K.C.,* for the respondents, were not called upon.

O'BRIEN, L.C.:—

We do not require to call on counsel for the respondents, as in our judgment the view of the learned Judge below was right, and ought to be affirmed.

The action really lies within very narrow limits; it is brought to determine a question under the Labourers Acts, which is one of importance so far as rural district councils are concerned, because if the plaintiff is right in his contention these councils would be seriously hampered in the administration of the Acts; so far from being free agents in acting within the powers conferred upon them, controlled as they are by sect. 29, they would be mere endorsers of the intentions of the labourers, whether those intentions were reasonable or unreasonable, and a construction of the Act which would bring about such a result would not, *prima facie*, commend itself to us.

The plaintiff claims that under an improvement scheme under the Labourers Acts, which was sanctioned and approved of by the Local Government Board, and enforced by an order made by that department, he was entitled to have allotted to him one of ten cottages which had been built on portion of the townland of Ballinwillin, which was included in the scheme, and that his claim could not be satisfied by the allotment to him of another cottage built, under the scheme, on an adjoining townland, which cottage it was contended, in one aspect of the case, was not as suitable for him as one of the particular cottages to which it was alleged he had a right.

Now, proceedings under these statutes are commenced by

(1) [1914] 2 I. R. 15. (2) 47 I. L. T. R. 31.

Appeal. 1913.

CONDON v. MITCHELSTOWN RURAL DISTRICT COUNCIL.

O'Brien, L.C.

"representations" under the Act of 1883, as amended; these representations are sent in, sometimes by individual labourers, at other times by labourers acting together in one representation; but it is the practice, as stated in the evidence, of this particular council (and it is a practice which is economical, and one to be approved of) that they do not promote a scheme for every single representation, but one scheme dealing with a large number of representations which, in their opinion, and in that of the Local Government Board, can be conveniently grouped together. Undoubtedly, application is originally made by the labourer, but it cannot be contended that by setting the machinery in motion, and naming a plot in the townland, the labourer can direct the whole operation of the statute, so that when a cottage is built he has the right to say he can enter the cottage whether the council approves or disapproves. That cannot be contended, although, once you depart from the clear terms of the statute, it would be more logical than what has been contended here.

Now, under sects. 4 and 6 of the Labourers (Ireland) Act, 1883, which still to some extent regulate the procedure, sanitary authorities are empowered to make improvement schemes; and, under section 6, one of the requisites of a scheme is that it "shall propose the erection of a sufficient number of labourers' cottages, so as to provide for the accommodation of the labouring class in suitable dwellings." Therefore, we have provided for, under these sections, first a scheme, and, secondly, the erection of a sufficient number of labourers' cottages to provide accommodation for labourers. Section 29 of the Labourers (Ireland) Act, 1906, limited the operation of section 6 of the former Act. It provides, by the second sub-section, that "regulations under this section shall provide that, on the first letting of any cottages or allotments comprised in a scheme, preference shall be given to agricultural labourers who have signed on their own behalf the representation on which the scheme was founded, or on whose behalf that representation was made."

Once it is admitted that a scheme may include a number of items originally dealt with by separate representations, the word "representation," apart from any definition, would have to be read "representations," where, under the 4th and 6th sections of

the former Act, the council had consolidated a number of these applications, and dealt with them under a single scheme. Therefore, the 29th section reads that preference shall be given to certain agricultural labourers who have signed the "representations" on which the scheme was founded.

One cannot, so far as I can see, limit the operation of the section in the manner required by the plaintiff in this action, namely, that you are to read into sect. 29, sub-s. 2, the words "in respect of each townland". . . "preference shall be given to agricultural labourers in respect of each townland who have signed on their own behalf the representation in respect of each townland in respect of which the scheme was founded." It would be necessary to read those words into sub-s. 2 of sect. 29 in each case in order to carry out what is contended for by the plaintiff in this case.

In choosing between a reasonable construction and an unreasonable one, namely, that the labourer is to have the right to indicate his particular cottage, and to bind the council from the start, I prefer to take the words of the section as I find them, providing as they do for an improvement scheme dealing with a number of cases, and for the preferential claims of certain labourers.

Now, in the present case the contention is, that because ten cottages were erected on the townland of Ballinwillin, the plaintiff must get a cottage within that particular place, and the contention is pressed to this extent, that, even if the council gave him a cottage in an adjoining townland, he could say that he had a right to get one in his own electoral division. Any such construction of the statute would hamper the district councils to an intolerable extent; it would mean that in respect of each townland they would be bound hand and foot, although the statute says that they are to have the power to allocate the plots within the scheme.

I can conceive a case where the allocation of cottages might be so unreasonable as possibly to afford a foundation for an action for damages, although an injunction might not lie; but I cannot yield to a contention which would place upon these sections a construction which is unwarranted, so far as I can see, by anything in the statutes themselves, and which would lead to strange consequences.

Appeal. 1913.

CONDON *v.* MITCHELSTOWN RURAL DISTRICT COUNCIL.

O'Brien, L.C.

It has been suggested that we are forced to arrive at this conclusion, because otherwise there might be some inconvenience with regard to the allotment of plots within the scheme. My answer is, that the Local Government Board have control over all these schemes; if anything unreasonable was proposed, they could control it. But certainly the hands of the district councils cannot be tied in the way suggested. It would mean, practically, that a separate scheme for each townland would be required.

I am not to be taken as supporting or endorsing the view that an action for an injunction would lie at the suit of a labourer who was caused inconvenience by being allotted a cottage in another townland. I do not think that an injunction in such a case would lead to any practical result, as the tenancy could be determined on a week's notice, and the tenant would be compelled to leave, or to bring an action for damages. No question of damages arises in this case at all; but even if such a case was open, I fail to see what loss the plaintiff has sustained.

The appeal must be dismissed with costs.

HOLMES and CHERRY, L.JJ., concurred.

Solicitor for the plaintiff: *David Callaghan.*

Solicitors for the defendants: *J. G. Skinner & Son.*

R. ST. J. C.

IN THE MATTER OF THE ESTATE OF CHARLES AMBROSE, OWNER; EDWARD A. HARNEY AND ANOTHER, PETITIONERS.

Appeal.
1913.
Dec. 4.

Mortgage—Transfer—Transferee for value without notice—Negligence of mortgagor—Fraud of mortgagee—Equities as between mortgagor and transferee—Two innocent parties—Which must suffer from fraud of third party?—Estoppel.

APPEAL by the owner from the order of Ross, J., reported [1913] 1 I. R. 506.

Sergeant Matheson, K.C., for the appellant.

Ronan, K.C., and *Brunskill*, for the respondents.

The Court of Appeal (O'Brien, L.C., and Holmes and Cherry, L.JJ.) unanimously affirmed the judgment of Ross, J.

Solicitors for the owner: *Collis & Ward.*
Solicitors for the respondents: *J. Thornton & Son.*

J. M.

Appeal.
1914.
Feb. 13, 16, 17.

ATTORNEY-GENERAL AND COMMISSIONERS OF PUBLIC WORKS IN IRELAND *v.* HOWLEY (1).

Statute of Limitations—Crown debt—Servants of the Crown—Commissioners of Public Works—Loan to occupier—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *s.* 31, *sub-s.* 2—*Landed Property Improvement (Ireland) Act,* 1847 (10 & 11 *Vict. c.* 32).

A loan made to an occupier of land by the Commissioners of Public Works acting in execution of the Land Law (Ireland) Act, 1881, s. 31, sub-s. 2, and the provisions of the Landed Property Improvement (Ireland) Acts made applicable thereto by Treasury Minute, is a Crown debt, and as such is not barred by the Statute of Limitations.

Decision of the Master of the Rolls, [1913] 1 I. R. 455, reversed.

APPEAL by the plaintiffs from an order of the Master of the Rolls reported [1913] 1 I. R. 455, where the facts are fully stated.

The Solicitor-General (*Jonathan Pim, K.C.*), and *Serjeant M'Sweeny, K.C.* (with them *Macafee*), for the appellants:—

The only question to be argued is, were the Commissioners of Public Works right in their contention that they were acting on behalf of the Crown. A Treasury minute was made on December 21st, 1881, pursuant to sect. 31, sub-s. 2, of the Land Law (Ireland) Act, 1881, and published in the *Dublin Gazette* of January 3rd, 1882. By this minute the following statutory provisions were made applicable to advances to occupiers under the Land Law (Ireland) Act, 1881, namely, 10 & 11 Vict. c. 32, ss. 3, 4, 5, 13, 14, 16, 17, 18, 23, 27, 29, 30, 31, 32, 56–60, 65; 12 & 13 Vict. c. 59, ss. 1–4; 15 & 16 Vict. c. 34; 23 & 24 Vict. c. 19; 24 & 25 Vict. c. 71; 25 & 26 Vict. c. 29, s. 3; 29 & 30 Vict. c. 40, s. 5. The earliest statutory provisions dealing with advances by the Treasury for purposes cognate to those coming under the Landed

(1) Before PALLES, C.B., HOLMES and CHERRY, L.JJ.

Property Improvement (Ireland) Acts were sects. 1, 2, 91, and 97 of 1 & 2 Wm. 4, c. 33; the effect of those provisions was that the money remained the King's money, and was advanced through the Commissioners of the Treasury as a conduit-pipe. A bond obligatory was given by the borrower to the King. By a subsequent statute (6 & 7 Wm. 4, c. 108) the bond might be given to the Secretary of the Commissioners. That principle remains in all the provisions authorizing the advances under the Landed Property Improvement (Ireland) Acts. The money remains the money of the King; the Commissioners of Public Works are not acting in their corporate capacity; though they are mortgagees, they are acting as servants of the Crown, which is quite possible: *Murphy* v. *Soady*, reported in a note to *Wheeler* v. *Commissioners of Public Works* (1), at p. 213; *The Queen* v. *M'Cann* (2). In *Murphy* v. *Soady* the Board of Works were held to be servants of the Crown. Mr. Ronan's argument in the Court below, based on the passage taken from the observations of Palles, C.B., at p. 235 of *Wheeler's Case*, that "Parliament might have imposed upon the defendants obligations to private individuals which would have been inconsistent with their character as Crown servants," cannot apply here, because the Commissioners do not make the loan; they are a mere conduit-pipe. The loan must be authorized by the Treasury, and even the form of the deed of charge is prescribed by the Treasury minute. *Wheeler* v. *Commissioners of Public Works* (1) does not apply, because that case turned upon the particular words of the Stephen's Green Act.

Ronan, K.C., and *Leonard* (with them *Denis Henry, K.C.*), for the respondent:—

The Board of Works were entrusted with this money to lend it as principals, and the contract in this case is one between principals. Our covenant is with the Commissioners, and the intention of the statute was that we could sue on our deed. The King is not mentioned in it; it is in form an ordinary deed by trustees who hold money in trust. If our contract is not with the Commissioners, we have no remedy but a petition of right for any

(1) [1903] 2 I. R. 202. (2) L. R. 3 Q. B. 141.

Appeal. 1914. ATTY.-GEN. *v.* HOWLEY.

wrong done by the Commissioners. In these advances there are two classes of transactions—one class where there is a rentcharge made payable to the Crown and created by an order, in which case the Commissioners cannot sue, and in consequence statutory rights are created, *e.g.*, on the one side the right of appointment of a receiver upon the petition of the Attorney-General, and on the other side the right of redemption. In the other class, to which this case belongs, these particular statutory rights, contained in sections 20, 37, 39, and 40 of 10 & 11 Vict. c. 32, have not been extended, but in lieu thereof a contract is made between the borrower and the Commissioners, and they alone can enforce it; the security is not created by an order, but is made by a deed of charge in the Commissioners' names; and this contract must be assumed to be *intra vires*, for if it is not the deed is void, and there is no charge at all. The debt is now barred by the Statute of Limitations.

They referred to *Wheeler* v. *Commissioners of Public Works* (1); *Graham* v. *Commissioners of Works* (2); *The Attorney-General* v. *Fetherstonhaugh* (3); *Irish Land Commission* v. *Ryan* (4); *M'Carthy* v. *Daunt* (5); *Barcroft* v. *Murphy* (6); *Pentland* v. *Stokes* (7).

The Solicitor-General in reply.

Feb. 17. PALLES, C.B.:—

This is an appeal from a decree of the Master of the Rolls dismissing an action brought by the Attorney-General and the Commissioners of Public Works against the assignee of a tenancy from year to year in lands in the county Sligo, to raise thereout by sale the sum due on foot of a charge created by a deed of 23rd January, 1884.

That deed was made between Michael Loftus, the then tenant and occupier of the lands (whose estate is now vested in the defendant), of the one part, and the Commissioners of Public Works in Ireland,

(1) [1903] 2 I. R. 202.
(2) [1901] 2 K. B. 781.
(3) 32 L. R. Ir. 614.
(4) [1900] 2 I. R. 565.
(5) 11 I. Eq. R. 29.
(6) [1896] 1 I. R. 590.
(7) 2 B. & B. 68.

described as "acting in execution of the Land Law (Ireland) Act, 1881, and the Landed Property Improvement (Ireland) Acts," of the other part; and by it Michael Loftus charged the said lands with the payment *to the Commissioners* of £245, with interest at the rate of 3½ per cent.

The ground of the decision of the Master of the Rolls was that the charge had been extinguished by the Statute of Limitations. In reply to this defence the plaintiffs insist that the money sought to be recovered is the money of the Crown, and if this be so, the Statutes of Limitations are inapplicable. The question on this appeal is whether the money sought to be recovered is the property of the Crown.

The sum secured by the charge was advanced by the Treasury to Loftus under the authority of the 2nd sub-sect. of sect. 31 of the Land Law (Ireland) Act, 1881, which enacts that—"The Treasury may authorize the Board of Works to make advances . . . to an occupier of land when satisfied that the tenancy, or other security which he may have to offer, is such as to insure repayment of principal and interest within such number of years as the Treasury may fix, or when the landlord joins the occupier in giving such security."

Pausing here for a moment before adverting to the following part of the section, it would seem that as advances made under this sub-section are public money authorized by the Act to be advanced by the Treasury through the Board of Works, which, until actually paid over to the borrower, are, in the hands of the Treasury and of the Board of Works, money of the Crown, the money the repayment of which is sought by the action is necessarily money of the Crown.

I proceed now with the sub-section: "Any advance to an occupier under this sub-section shall be subject to the provisions of the Landed Property Improvement (Ireland) Acts so far as the Treasury may declare the same to be applicable."

These Acts are by sect. 57 defined to mean the 10 & 11 Vict. c. 32, and any Acts amending or extending the same.

This Act (10 & 11 Vict. c. 32) was an Act which enabled the Board of Works, subject to rules to be from time to time made by the Treasury, to make advances to owners of lands in Ireland for

Appeal. 1914.

ATTY.-GEN. *v.* HOWLEY.

Palles, C.B.

improvement of land, and for this purpose (by sect. 2) the Treasury were authorized to issue to the Board of Works sums not exceeding a million and a half of money, and (by sect. 3) the Commissioners of Public Works were constituted a Corporation for the purpose of the Act, although they were not expressly authorized thereby to hold lands. By sect. 5 no loan was to be made until it was sanctioned by the Treasury. And by sect. 18 the Board of Works were authorized to issue instructions and forms for use under the Act with the sanction of the Treasury.

The mode prescribed by the Act for securing loans was that the Commissioners should, under sect. 20, make an order under their seal with respect to the making of the loan and the execution of the works, and, by sects. 22 and 37, from the registry of that order the lands therein mentioned became chargeable with a rentcharge of £6 10*s.* per cent. for 22 years payable to Her Majesty. By sect. 39 the rentcharge was made recoverable in case of default by the appointment by the Court of Chancery of a receiver on the petition of the Attorney-General; and by sect. 40 that officer was authorized to sue by Civil Bill for sums due in respect of the rentcharge, not exceeding £50. By sect. 48 the paymaster for Civil Services was authorized to give receipts for sums paid on foot of the rentcharges. There were also provisions authorizing a sale of the lands if the rentcharge should be two years in arrear.

It is unnecessary to refer here in further detail to the provisions of this Act, as the Master of the Rolls arrived at the conclusion, in which everyone must agree, that it is manifest that liability under this Act was a Crown debt, and that if the present case were governed exclusively by it, the liability of the defendant's lands would be a liability to the Crown.

At this point, and before referring to the action of the Treasury under the Act, a question of grave importance arises.

The Act of 1881 contemplates loans of State money—money of the Crown. The only conditions imposed by that Statute as to these loans are by the application by the Treasury of some or all of the provisions contained in the Act of 1847. That Act treats the loans which are its subject-matter as loans which from their advance to their repayment are debts due to the Crown. Where, in such legislation, is to be found any authority or jurisdiction in the

Treasury to change the nature and quality of the Crown money authorized by the Act of 1881 to be lent, from that of Crown money, to money governed by a different code of law, the money of a subject?

I cannot find one word in the Act of 1881 which would authorize so momentous a change. I am of opinion that the Act of 1881 contemplates the loans thereunder to occupiers of land as advances of State money which, until their extinguishment by repayment, remain the property of the Crown, and even if the Treasury had approved of a form of deed of the Commissioners which by express declaration stated that the advance was not to be deemed the money of the Crown, and was to be subject to the incidents of a loan by a subject, I should have been of opinion that such declaration by the Treasury was *ultra vires* and void, and that notwithstanding it the loan would remain, until repaid, a debt due to the Crown.

Such a momentous change would amount to an application of a Statute of Limitations to the Crown, and could not be effected by the Treasury or by any tribunal other than Parliament itself, and that by clear words; and in my opinion the delegation to the Treasury contained in sect. 31, sub-s. 32, was wholly insufficient for the purpose.

I am satisfied that the object of the provisions I have read was, when the Act was foreseen to have as a probable effect the creation of valuable interests in occupiers as distinguished from owners of land, to extend to such occupiers, subject to the Board of Works being satisfied of the sufficiency of the security, the power of borrowing State money, for the purposes specified in the enactment, under substantially the same or similar provisions to those under which, by the Act of 1847, "owners" were empowered to borrow the same, and that the Treasury were authorized to apply to the procedure for obtaining these newly authorized advances such portions of the former procedure as they should think fit, but that underlying this almost formal matter was the broad constitutional principle that as the money advanced was, as undoubtedly was that advanced under the Act of 1847, the money of the King, it should preserve its character as such, and that such debt as was created by its loan should be a Crown debt.

Appeal.
1914.
ATTY.-GEN. *v.* HOWLEY.
Palles, C.B.

In pursuance of the sub-section the Treasury declared to be applicable certain sections of the Act of 1847, including sect. 18, which authorized the Board of Works, with the sanction of the Treasury, to issue forms and instructions for use under the Act; and the Board of Works, with such sanction, issued the form of deed of charge which has been used in the present case.

The matter relied on by the defendant is that, by the form of deed thus issued and used, the payment of the sum advanced, which is charged on the lands, is payment to the Commissioners, and not payment to His Majesty, and that the section of the Act of 1847 made applicable by the Treasury did not include sect. 37, which made the charge payable to His Majesty, or sect. 39 or sect. 40, which recognized that it was so payable by enabling the Attorney-General to sue in respect of it. By these matters the defendant insists that the money ceased to be the money of the Crown, and became the money of the Commissioners as subjects. Whether this is so or not is the net question for decision.

I am of opinion that the money did not by reason thereof cease to be the money of the Crown. I am of opinion that the Act of 1881 did not authorize security for the money borrowed being given to anyone except the King, or to a servant of the King as such, and that, as the Commissioners are described in the deed as acting in execution of that Act and the Act of 1847, they took the security as servants of the Crown for that which, in my opinion, was lent as money of the Crown, and the debt in respect whereof remained throughout and now is a Crown debt.

As to the cases cited, I do not think it necessary to refer to more than two. *Wheeler* v. *The Commissioners of Public Works* (1) does not apply. The main factor in its determination was the statute of 1887, vesting Stephen's Green in the Commissioners—a statute to which the Act of 1881 has no analogy.

In *The Attorney-General* v. *Fetherstonhaugh* (2), the Queen's Bench had held that a rentcharge created under the Act of 1847 was a security for the repayment of the sum advanced and interest, and that there remained a personal liability on the borrower to

(1) [1903] 2 I. R. 202. (2) 32 L. R. I. 614.

repay it. This decision was reversed by the Court of Appeal, who held that the effect of the statute was that the creation of the rentcharge mentioned in the 22nd and 37th sections was to extinguish the debt, and that where, as there, the rentcharge ceased to exist by the determination by eviction of the estate charged, the Commissioners of Public Works were without remedy.

The Act of 1881, in this respect differing from that of 1847, contemplates the continuance of the debt until repayment. There is no jurisdiction thereunder, and under the sections of the Act of 1847, made applicable to convert it into a rentcharge, and consequently there cannot be any question of an extinguishment here.

Before concluding, I desire to say that I am not impressed by Mr. Ronan's argument that this decision involves a determination that a petition of right would be the only remedy for wrong done by the Commissioners to the defendant, as, for instance, by cutting unripe timber, if, and when, they go into possession of the lands as mortgagees; but as the question does not arise here, I do not express an opinion whether such a result is involved.

In my opinion, the order appealed from should be reversed and, the amount due being admitted, there should be the usual decree for a sale.

Without at all determining that we have not jurisdiction to give costs, we direct each party to bear his own costs of the appeal.

HOLMES, L.J., concurred.

CHERRY, L.J.:—

Once it is admitted, as it has been expressly admitted by the Master of the Rolls in his judgment and by counsel for the defendant in this Court, that loans made by the Board of Works to owners of lands under the provisions of the Landed Property Improvement (Ireland) Acts are Crown debts, all difficulty appears to me to disappear from this case; for I can see no difference, as regards the nature of the debt, between advances made under 10 & 11 Vict. c. 32, and those made under the 31st section of the Land Act, 1881. In both cases each indivi-

Appeal.
1914.
ATTY.-GEN.
v.
HOWLEY.
Cherry, L.J.

dual loan must be sanctioned by the Treasury. In both, the advance is made out of moneys voted by Parliament to the Crown; and in both, the repayment is made to the Commissioners of Public Works and by them transmitted direct to the Treasury.

Two grounds were relied upon in the argument before us for differentiating the loans under the earlier Acts from those under the 31st sect. of the Act of 1881, with which we are now dealing. In the first place, it was said that, inasmuch as the provisions of 10 & 11 Vict. c. 32, which were made applicable to loans under the later Act, did not include sects. 20, 37, 39, and 40, which, it was argued, had the effect of constituting the liability a Crown debt under the earlier Acts, the debt under the later Act could not be assumed to be a Crown debt; and, in the second place, it was argued that the form of the deed of charge, which was prescribed by the Treasury under the powers conferred upon them by the Act of 1847, itself showed that the debt was not one due to the Crown, but due to the Board of Works as a private corporation.

In answer to the first argument, it appears to me only necessary to say that the liability of the borrower does not acquire its character of a Crown debt from these sections at all, but from its own inherent nature as money advanced by the Crown, and to be repaid to the Crown in certain instalments. I do not think it would be in the power of the Treasury to make such a sweeping change by their minute as to alter the nature of the liability of the borrower in this way. Nor can I see any evidence of any intention on their part to make such an alteration. The Master of the Rolls says that the sections of the Act of 1847 which were not made applicable to loans under the Act of 1881 must have been omitted for some purpose, and he arrives at the conclusion that they were so omitted with the object of changing the character of the liability. With every respect for the view of the learned Judge, it seems to me to be a much simpler and more natural explanation that they were omitted because they were unnecessary, having regard to the new form of security which was adopted under the Act of 1881. The omitted sections deal primarily with the remedy for the recovery of the debt, and only incidentally refer to the nature of the liability.

The second argument is based upon the form of the deed of charge, which is prescribed by Treasury regulations for loans under the Act of 1881, and which, of course, has been adopted in the present instance. The Crown is not mentioned in this deed, which is in the ordinary form of deeds between subject and subject, and is made between the Commissioners of Public Works of the one part, and Michael Loftus of the other part. It is argued that the sole liability of the lands charged is under this deed, and that the Commissioners are made parties to it solely as a private corporation. If so, the debt, it is urged, cannot be a Crown debt.

Now, the Commissioners of Public Works undoubtedly fill a double capacity. In some cases they are dealt with as a private corporation, without having any of the privileges of the Crown. In others they are treated merely as servants of the Crown, discharging public duties as such. This distinction is illustrated most clearly by contrasting the cases of *Wheeler* v. *Commissioners of Public Works* (1) and *Murphy* v. *Soady* (2), reported in the same volume of the Law Reports. The cause of action was the same in the two cases, viz., negligence. The earlier of the two cases was connected with the duties of the Commissioners in the Phœnix Park, the later one with those in St. Stephen's Green Park. In *Murphy* v. *Soady* (2) they were held not to be liable, on the ground that they were acting merely as servants of the Crown, and were thus not liable for the acts of their subordinates. In *Wheeler's Case* (1) they were held to be liable, on the ground that they were acting merely as a private corporation under the powers conferred upon them by the private Act of Parliament dealing with St. Stephen's Green Park.

In which capacity, then, are the Commissioners acting when they enter into contracts for loans to occupiers under the provisions of the 31st section of the Act of 1881? Clearly, in my opinion, in their capacity of public servants. They are, as the Solicitor-General very well put it in his able argument, merely conduit-pipes through which the Crown money is advanced from the Treasury, to be repaid directly to the Treasury, according to the

(1) [1903] 2 I. R. 202. (2) *Ib.*, foot-note, p. 213.

Appeal. 1914.

ATTY.-GEN. *v.* HOWLEY.

Cherry, L.J.

terms sanctioned by the Treasury. And their position in this respect is just the same whether the advances are made to owners under the Act of 1847, or to occupiers under the Act of 1881.

Mr. Ronan argues that a great hardship is involved in this view of the position of the Commissioners in reference to mortgages; for, he says, the borrower will be debarred from enforcing his rights under the deed as against the Commissioners. He can only proceed by petition of right against the Crown. But the hardship is no greater than that imposed in every case where contracts on behalf of the Crown are made by public servants. Such cases are very numerous, and I do not think any great hardship is involved in treating loans to occupiers under the Landed Property Improvement (Ireland) Acts as such contracts.

For these reasons I agree with the other members of the Court that the judgment of the Master of the Rolls should be reversed, and an order made in the terms prayed for in the statement of claim.

Solicitor for the appellants: *J. Donnelly.*
Solicitor for the respondent: *M. J. Howley.*

J. M.

LEIGH-WHITE *v.* RUTTLEDGE

Barton, J.
1913.
Nov. 11, 12, 13.

Marriage settlement—Covenant to settle after-acquired property—Gift from husband to wife.

There is no general rule that a covenant in a marriage settlement to settle after-acquired property cannot capture gifts from the husband to the wife.

In re Ellis's Settlement ([1909] 1 Ch. 618), and *In re Plumptre's Settlement* ([1910] 1 Ch. 609), followed.

Kingan v. *Matier* ([1905] 1 I. R. 272) not followed.

A marriage settlement made in 1865 contained a covenant by the husband and wife separately to settle any sum or sums, stocks, or other personal estate exceeding in amount or value £200 at any one time which should during the coverture "be given or bequeathed to, or in any manner vest in," the wife.

In 1897 the husband, in consideration of natural love and affection, assigned absolutely to the wife a policy of insurance on his life for £6000 (with bonuses), and two mortgages for £500 and £600, respectively.

Held, that these were captured by the covenant to settle.

SUMMONS.

By Indenture dated 31st July, 1865, made between Henry Herbert of the first part; the Rev. Edward Stewart and Katherine Elizabeth Stewart (his daughter) of the second part; Arthur Maynard Denny and Herbert Stewart (trustees) of the third part (being a settlement executed on the marriage of Mr. Herbert and Miss Stewart), a sum of £2500, to which Miss Stewart was entitled, was assigned to the trustees upon the trusts declared by the settlement, which shortly were—for the wife for life, and, after the death of the survivor of the wife and the husband, for all the children of the marriage, except an eldest son, as the husband and wife should by deed jointly appoint or as the survivor should by deed or will appoint.

The settlement contained the following covenant:—"The said Henry Herbert and Katherine Elizabeth Stewart doth [*sic*] hereby separately for himself and herself, and his and her executors, administrators, and assigns, covenant, and agree with and to the said Arthur Maynard Denny and Herbert Stewart, their executors,

Barton, J. 1913.

LEIGH-WHITE v. RUTTLEDGE.

administrators, and assigns, that in case the said intended marriage shall be solemnized, and any sum or sums, stocks, or other personal estate exceeding in amount or value the sum of £200 at any one time, shall at any time or times, during the said intended coverture, be given or bequeathed to or in any manner vest in the said Katherine Elizabeth Stewart, or in him the said Henry Herbert in her right, then, and in such case and so often as the same shall happen, the said Henry Herbert and Katherine Elizabeth Stewart respectively, or their respective executors, administrators, and assigns, shall and will, at the cost and charges of the said trust estate, do and execute all such acts, deeds, and assurances whatsoever as shall be necessary for properly assigning or transferring such property unto, or vesting the same for, all the right and interest of the said Katherine Elizabeth Stewart, or of him the said Henry Herbert, as her husband therein, in the said Arthur Maynard Denny and Herbert Stewart, or the survivor of them, their or his executors, administrators, or assigns, so and in such manner that the same may be held by them or him upon and for the trusts and purposes, and with, under, and subject to such of the powers, provisoes, declarations, and agreements hereinbefore expressed and declared of or concerning the said moneys and premises hereinbefore settled or intended so to be as shall be then subsisting or capable of taking effect, and that in the meantime and until such a settlement as aforesaid shall be made they, the said Henry Herbert and Katherine Elizabeth Stewart respectively, and their respective executors or administrators, and all persons in whom the said premises hereby covenanted to be settled as aforesaid shall be vested, shall stand and be possessed of the same upon and for the trusts, intents, and purposes, and with and subject to the powers, provisoes, declarations, and agreements as aforesaid."

On the 24th July, 1897, Henry Herbert executed two deeds, whereby, in consideration of natural love and affection, he assigned absolutely to his wife, Katherine Elizabeth Herbert, a policy of insurance on his life for £6000, and £2953 18*s.*, bonuses thereon, and two mortgages for £500 and £600, respectively.

Henry Herbert died on the 18th January, 1898, without having concurred with his wife in any apportionment of the trust funds comprised in the settlement. At the date of the execution of

Mrs. Herbert's will, next hereinafter mentioned, Richard Biddulph Martin and Thomas Greany were the trustees of the marriage settlement of 31st July, 1865, and the trust funds vested in them amounted to a sum of £3693 11*s.* 3*d.*, the sum of £2500 put in settlement having been increased by an additional sum of about £1000 received by Mrs. Herbert, and transferred to the trustees of the settlement by her.

By her will dated 31st December, 1908, Mrs. Herbert appointed the plaintiffs her executors and (after reciting that in the events that had happened she had power to appoint as she should think fit the funds subject to the trusts of her marriage settlement, amounting in all to the principal sum of £3693 11*s.* 3*d.* then standing in the names of Richard Biddulph Martin and Thomas Greany as trustees of said settlement) she thereby appointed "that the said sum of £3693 11*s.* 3*d.*, or the stocks, shares, funds, or securities representing the same, and all other (if any) securities subject to the trusts of said Indenture of Settlement shall immediately on my decease go, belong to, and be held by the trustees or trustee for the time being of the said Indenture of Settlement upon trust for my three daughters, Kathleen Olive Everett (*née* Herbert), Violet Ina Jane Herbert, and Gwendolen Egerton Herbert, as tenants in common and not as joint tenants"; by her will the testatrix also devised and bequeathed all the real and personal estate to which at the date of her death she should be beneficially entitled, or which she should have power to dispose of beneficially by will, and not thereby otherwise disposed of, unto her executors upon trust for conversion. The will then provided as follows:—"And I direct my said executors out of the money to arise from the sale and conversion of my real and personal estate, and out of my ready money, to pay my funeral and testamentary expenses, and debts and legacies bequeathed by this my will, or any codicil hereto, and to stand possessed of the residue upon trust as to one-third part thereof for my daughter Violet Ina Jane, and as to one other third part thereof for my daughter Gwendolen, and as to the remaining one-third part thereof upon trust to invest the same in any of the securities hereby authorized, and to pay the income of such investments to my daughter Kathleen during her life, and after

Barton, J. 1913. LEIGH-WHITE v. RUTTLEDGE.

her decease upon trust for all or any of the children or child of my said daughter Kathleen, who being sons or a son attain the age of twenty-one years, or being daughters or a daughter attain that age, or marry under it, and if more than one in equal shares."

Mrs. Herbert died on the 2nd August, 1912, and on the 12th September probate of her will was granted to the plaintiffs, the executors therein named.

Kathleen Olive Herbert (one of the testatrix's daughters) had intermarried with Herbert Bernard Everett, and there was issue of their marriage two children, Henry Everett and Anthony Blaize Everett, both minors. No settlement had been executed on the said marriage.

On the 31st May, 1913, the plaintiffs, as executors of the will of Mrs. Herbert, issued a summons asking for the decision by the Court of certain questions. The only one material for the purposes of this report was whether or not the policy and bonuses and mortgages assigned by Henry Herbert to his wife by the deeds of the 24th July, 1897, were captured by the covenant to settle after-acquired property in the settlement of 1865.

Arthur Meredith, K.C., for the executors and trustees of the will of Mrs. Herbert :—

We submit the question for decision. We suggest that the point is covered by *Kingan* v. *Matier* (1), where it was held that a gift from husband to wife was not within the covenant to settle after-acquired property.

Jellett, K.C., for Kathleen Olive Everett, Violet Ina Jane Herbert, and Gwendolen Egerton Herbert, appointees of the settled property, under the will of their mother, Mrs. Herbert :—

The policy of insurance, with the bonuses thereon, and the mortgages, which were assigned by her husband absolutely to Mrs. Herbert by the deeds of 24th July, 1897, are captured by the covenant to settle after-acquired property contained in the marriage settlement of 1865. It is a question of the construction of the covenant, which is of the widest possible import, *i.e.*, " shall at any time or times during the said intended coverture be given or bequeathed or in any manner vest in the said Katherine

(1) [1905] 1 I. R. 272.

Elizabeth Stewart." There is, so far as the wife is concerned, a separate covenant by her (apart from her husband) that any personal estate of the specified amount coming to her in any manner was to go into settlement. It is a question of the terms of the covenant. In *Scholfield* v. *Spooner* (1) Cotton, L. J., says:— "Whatever the consequences may be, where the parties have entered into a covenant, we have nothing to do but construe the covenant and to give effect to the construction, however inconsistent it may be with what we may guess to have been the real intention of the parties." In *Kingan* v. *Matier* (2), at p. 278 of the report, the point is taken by your Lordship that there was in that case no obligation undertaken by the wife alone, and there is the further distinction that in that case there were no words like these in the present case—"coming to her in any manner." *In re Ellis's Settlement* (3) shows that there is no general rule of construction of covenants in marriage settlements to settle after-acquired property of the wife, that a gift from the husband to the wife during coverture is to be excluded. Gifts from husband to wife no doubt are not to be included in this class of covenant unless there are express words capturing them. This is a rule of construction. Swinfen Eady, J., in that case refers to *Kingan* v. *Matier* (2), and says, "The covenant in the present case is a covenant by the wife, and therefore is not covered by the case in Ireland." We submit that the rule to be applied in the present case is that stated by Cotton, L. J., in *Scholfield* v. *Spooner* (1). *In re Ellis's Settlement* was followed by Eve, J., in *In re Plumptre's Settlement* (4). *Coles* v. *Coles* (5) is distinguishable, for in that case there was no express clause for the settlement of after-acquired property; and so is *Carter* v. *Carter* (6), which was a case of real and personal estate coming to the wife under the will of her deceased husband. Those cases rest on different considerations. The question is not one of intention, but the covenant is to be interpreted according to its clear and unambiguous meaning.

(1) 26 Ch. Div. 94, at p. 100.
(2) [1905] 1 I. R. 272.
(3) [1909] 1 Ch. 618.
(4) [1910] 1 Ch. 609.
(5) [1901] 1 Ch. 711.
(6) 8 Eq. 546, 551.

Barton, J. 1913. LEIGH-WHITE *v.* RUTTLEDGE.

J. Creed Meredith, for Henry Everett and Anthony Blaize Everett, minors :—

The settlement here was before the Married Women's Property Act, 1882, and the covenant to settle the wife's after-acquired property which it contains shows on its very face that the law as it stood before the 1st January, 1883, was definitely contemplated. The Married Women's Property Act, 1882, gave an entirely new significance to gifts from the husband to the wife. But the point of view which must be taken is that of the old law. The question is whether or not gifts from the husband to the wife would have come within the terms of the covenant if the Married Women's Property Act, 1882, had not been passed. Clearly they would not. This covenant contemplated property which the husband might acquire in his wife's right. Property coming from a stranger would answer that description, but not property given by the husband to the wife, for, both before and after the gift, the property would at law be in the husband. Hence, even literally, the property would not be property acquired by the wife or by the husband in her right. Further, there is the inherent absurdity of making the covenant include gifts from the husband to the wife. The covenant is one in a common form, and has a history behind it. Its object must be considered, and it is such considerations alone that prevented the covenant from applying to the income of the settled property. It was intended to be in the wife's interest. But if it were made to include gifts from the husband to the wife, its only effect in that connection would be to prevent the husband giving the wife anything which she might in effect, though not at law, enjoy as her separate property. The intending husband and wife would be supposed to contract that if the husband should desire to give, and the wife to receive, anything above a specified sum, it could not be done. But gifts from a stranger are in a different position. All the older authorities are against the inclusion of gifts from the husband to the wife : *Dickinson* v. *Dillwyn* (1) ; *Carter* v. *Carter* (2) ; *In re Edwards* (3) ; *Coles* v.

(1) L. R. 8 Eq. 546.
(2) L. R. 8 Eq. 546, 551.
(3) L. R. 9 Ch. 97.

Coles (1); *Kingan* v. *Matier* (2). In *Kingan* v. *Matier* (2) the question was fully considered. No doubt in that case the settlement was made very shortly after the Act came into force, but the Court held that the old form of covenant was followed, and that the covenants should be construed with reference to the old law. That case should be followed in preference to *In re Ellis's Settlement* (3) and *In re Plumptre's Settlement* (4).

BARTON, J.:—

There is no general rule that a covenant to settle after-acquired property cannot capture gifts from the husband to the wife. The question is one which must be decided upon the true construction of the particular covenant in each case. *Kingan* v. *Matier* (2) followed *Coles* v. *Coles* (1); and, as Mr. Creed Meredith pointed out in his able argument, was in conformity with the trend of authority at that date. But if *Kingan* v. *Matier* (2) conflicts with the recent decisions of Eve, J., and Swinfen Eady, J., in *In re Ellis's Settlement* (3) and *In re Plumptre's Settlement* (4), the latter cases should be preferred, and followed. They are quite indistinguishable from the present case, in which there is the further element that the covenant expressly mentions property "given" to the wife. The question which is submitted to the Court will be answered by holding that the policy with bonuses, and the mortgages, which were assigned to his wife by Henry Herbert, were caught by the covenant to settle after-acquired property.

Solicitors for all parties: *F. W. Meredith & Son.*

R. W. L.

(1) [1901] 1 Ch. 711.
(2) [1905] 1 I. R. 272.
(3) [1909] 1 Ch. 618.
(4) [1910] 1 Ch. 609.

M. R.
1913.
June 6, 7.
Nov. 20.
1914.
Jan. 20.

In re THE TRUSTS of the GRAND CANAL BOATMEN and WORKMEN'S BENEFIT SOCIETY FUNDS. TIERNEY and Others *v.* TOUGH and Others.

(1913. No. 101.)

Benefit Society—Unregistered Friendly Society—Action for dissolution—Unexpended funds—Charity—Cy-près—Bona vacantia—*Resulting trust.*

A society was established by a canal company for the benefit of its boatmen and workmen. Each member contributed a weekly sum, which was supplemented by a weekly contribution from the company. The society was not registered. The management of the society was entrusted to a committee, which consisted of three elected members and three officials of the company. This committee was given the regulation of the affairs of the society, and the power to frame or amend the rules when requisite. The contributions to the funds were lodged to the credit of the society, and the company was trustee for it.

The funds of the society were applied, pursuant to the rules, in payment of sick and mortality benefits to members and their families. When the National Insurance Act, 1911, came into force, it was found impossible to carry on the business of the society, and it was resolved to wind it up, and an action for that purpose was brought on behalf of the members against the committee and the company, the Attorney-General being afterwards made a party. The unexpended funds amounted to £1170.

Held, (1) that the society was not a charity to which the doctrine of *cy-près* could be applied, neither was the Crown entitled to the funds as *bona vacantia*; (2) that the contributions of the company were absolute gifts to the society, and that there was no resulting trust in favour of the company; and (3) that the funds were the property of the society, and were divisible amongst the existing members at the time when the business of the society ceased to be carried on, in proportion to the amounts contributed by them.

Cunnack v. *Edwards* ([1896] 2 Ch. 679) distinguished.

In re Printers' and Transferrers' Amalgamated Trades Protection Society ([1899] 2 Ch. 184) considered.

Trial of Action.

This action was brought on January 30th, 1913, by John Tierney, Thomas Bulger, Edward Walsh, John Egan, Peter Lawlor,

Thomas Mellon, and Thomas McDermott as plaintiffs, on behalf of themselves and all other members of the Grand Canal Boatmen and Workmen's Benefit Society, claiming—(1) to have the said society dissolved and the affairs thereof wound up under the direction of the Court, and to have all necessary accounts and inquiries taken; and (2) to have the rights of all parties beneficially interested in the trust funds ascertained and declared. It was entitled in the matter of the trusts of the funds of the society, and in the matter of the Trustee Act, 1893.

The plaintiffs sued as members of the society. The original defendants were George Tough, G. B. Allen, J. A. C. Campion, John Judge, Peter Lawlor, and Edward Walsh, who were sued as the committee of management of the society, and the Grand Canal Company, sued as the trustees of the funds of the society. By order dated June 7th, 1913, the Attorney-General for Ireland was added as a defendant.

The facts of the case were as follows :—

On the 26th day of June, 1878, at a meeting of the Court of Directors for the ordering, managing, and directing the affairs of the Grand Canal Company, on the memorial of the boatmen in the employment of the Grand Canal Company in reference to the formation of a sick and mortality fund, it was ordered that whereas it was desirable to form a fund for payment of boatmen during sickness, and to defray funeral expenses in the event of death, and as it seemed unnecessary to encumber so small a society with the expenses and rules of a registered benefit society, the Board approved, until further order, of the following rules :—

1. That all the boatmen and crews of steamers in the company's employment must be members, and each member shall be required so long as he continues in the service, to submit to a reduction of a sum of 4*d.* per week in his wages, such sum to be paid into the fund as hereinafter provided. 2. That the Grand Canal Company give a like sum of 4*d.* per week for each member. 3. That the fund so formed shall be lodged in the savings bank each fortnight to the credit of the trustees, viz., the secretary, the traffic manager, and Patrick Fox and Charles Claffy, boat-masters,

M. R. 1913. TIERNEY v. TOUGH.

who shall also be the managers of the fund of the society. 4. That the claims on the fund shall be—(*a*) payment of half wages in case of sickness (not exceeding 10*s.* a week), for any period not exceeding three months; one-third wages (not exceeding 6*s.* 8*d.* a week), the second three months; one-fourth wages (not exceeding 5*s.* a week), for any period not exceeding the third three months; (*b*) payment of the cost of funeral expenses of a member, not exceeding £3; (*c*) that in the event of the death of a member, the sum of £5 be given to his widow or mother, if any, or, if wife and mother be dead, to the children, if any; (*d*) that a sum of £1 10*s.* be allowed towards the funeral expenses of a member's wife or child.

On the 3rd day of November, 1890, the Board of Directors approved of certain amended rules in reference to the said fund, viz.—That any man dismissed from the service of the Grand Canal Company, or ceasing to subscribe, or leaving the service of his own accord, shall have no claim on the fund, on account of past contributions.

Subsequently, at a meeting of the company in reference to the sick and mortality fund of the boatmen in their employment, it was ordered that it was desirable to provide a fund for payment of boatmen during sickness, and to defray funeral expenses in the event of death, and the Board approved of the following rules, amongst others:—

1. All boatmen and crews of steamers and workmen under weekly wages at James's Street Harbour in the employment of the Grand Canal Company, are eligible for membership; and if, after payment of six months' subscription, any member accept any other employment under the company, he shall not thereby forfeit his membership.

2. Each member is to pay 4*d.* per week to the fund of the society, the company also contributing a weekly sum for each member.

3. Any member leaving the service of his own accord, or being dismissed from the employment of the Grand Canal Company, or struck off the list of subscribers by the committee as a defaulter, will have no claim on the society's fund on account of past contributions.

4. The claims upon the benefit fund for sick and mortality allowance shall be as follows :—

SICK ALLOWANCES.

(*a*) A member who shall send in a claim accompanied by a medical certificate within three days after he is unable to work may, if the committee is satisfied, receive allowance from the date of the certificate. In the case of a member leaving sick in the country, he must also, within three days, forward a certificate from the company's agent at the station where he left, stating that he was unable to proceed with his boat. During a period not exceeding three months of 10*s.* 9*d.* per week ; during a further period, not exceeding a second three months, of 6*s.* per week ; and during any further period, not exceeding a third three months, of 5*s.* per week.

MORTALITY ALLOWANCES.

(*b*) Payment not exceeding £5 payable to the widow or mother, or children, or caretaker of the children, or if the committee may think fit, to the unmarried sisters or other next-of-kin dependent on the deceased. The payment of this gratuity being left entirely to the option of the committee.

(*c*) Payment of 50*s.* towards the funeral expenses of the wife of a member, or of his child if over ten years of age, and if younger 30*s.*

(*d*) Payment of 50*s.* towards the funeral expenses of the father or mother of any unmarried member of the society.

MANAGEMENT.

10. A committee of management shall be formed, three of whom may be elected annually by the members of the society out of their number, two to represent the interests of the canal and Barrow men, and one the Shannon men, and three officials of the company.

11. This committee of six shall have the regulation of the affairs of the society, and shall meet at least once a year, in the month of January, to inspect the accounts and balance sheet

M. R. 1913.

TIERNEY v. TOUGH.

of the society for the previous year, and frame or amend the rules when requisite; the accounts to be previously audited and certified by two members of the committee. At this meeting the names of the members of the committee elected, as per Rule 10, for the current year shall be declared. Three to form a quorum. In case of an equal division, the chairman to have a casting vote.

12. Cheques may be drawn on the bank account by two members of the committee, for payment of the society's liabilities as required. The accounts book to be checked by the auditors every three months.

13. The subscriptions to the fund shall be lodged regularly to the credit of the society, the trustees to be the Grand Canal Company.

14. The books of the society will be open to the inspection of any member of the committee or at the signed request of any seven members of the society.

The society was not registered or incorporated under any Act.

On January 11th, 1893, the committee of the society resolved that, as the directors of the company had stated that the company's subscription to the funds of the society, owing to the largeness of its balance, would be reduced to 1*d.* per week per man until further notice, the men's subscription be reduced to 3*d.* per week for that year. This reduced payment of 3*d.* per week by each workman, and of 1*d.* per week by the company, was continued during subsequent years, although this resolution was confined to the year 1893, and no alteration was made in rule 2, which prescribed payment of 4*d.* per week.

After the National Health Insurance Act of 1911 came into force, it was decided to wind up the society; and at a special meeting of the society held on July 12th, 1912, it was decided that no contributions should be collected, and no payments made after that date. On the 15th July, 1912, there were 243 members of the society, of whom 127 were qualified under the rules of the society to share in the benefits, but the remaining 116 were not so qualified. The surplus funds of the society were lodged from time to time with the company, which paid 3 per cent. interest thereon to the society.

The company, by their statement of defence, submitted to the jurisdiction of the Court, and were willing that the relief claimed should be granted, but submitted that they were, by reason of their contributions, beneficially interested in the fund of the society, and that they had a right to share in the distribution of it. The other defendants put in a formal defence submitting their rights to the Court.

On January 16th, 1913, the sum in hands to the credit of the society amounted to £1170 6*s.* 1*d.* Of this sum the company claimed to have contributed £416 6*s.* 11*d.*, made up as follows:—Cash in hands on December 31st, 1892, £775 1*s.* 8*d.*; of this 4*d.* per week was contributed by each member, and 4*d.* per week per member was contributed by the company, and accordingly the company contributed one-half, £387 10*s.* 10*d.* Cash in hands on January 16th, 1913, £1170 6*s.* 1*d.* Deduct amount in hand on December 31st, 1892, £775 1*s.* 8*d.*; balance, £395 4*s.* 5*d.* Of this sum 3*d.* per week was contributed by each member, and 1*d.* per week per member was contributed by the company, and accordingly the company contributed one-fourth of this sum, namely, £98 16*s.* 1*d.* Adding this to their contribution of £387 10*s.* 10*d.* prior to 1893, the total contribution of the company was £486 6*s.* 11*d.*, and the company sought to have this sum repaid.

The action came on for hearing on motion for judgment on June 6th, 1913, and was adjourned on June 7th, 1913, in order that the Attorney-General might be made a defendant. The Attorney-General put in a formal defence submitting his rights to the Court.

The adjourned hearing took place on November 20th, 1913.

Littledale, K.C., and *Denning*, for the plaintiffs:—

In no view of the rules is the society a charitable society: *In Re Buck* (1). It is a living society undissolved, and the members and their representatives are capable of receiving benefits from it as an existing society, and participating in any division of the fund of the society in a winding up. By the original rules

(1) [1896] 2 Ch. 727.

M. R. 1913. TIERNEY v. TOUGH.

of 1878, every workman of the company was bound to join the society, and to contribute to its fund 4*d.* a week, which was deducted from his wages by the company. By the subsequent rules membership was optional. The society has not been registered, but the Court has jurisdiction to wind it up: *Re Lead Company's Workmen's Fund Society* (1). The fund should be distributed among the existing members in proportion to the amounts contributed by them, as was done in *Re Printers' and Transferrers' Amalgamated Trades Protection Society* (2). In that case the Attorney-General was made a party, and made no claim to the fund as *bona vacantia*. In *Cunnack* v. *Edwards* (3), which was there distinguished, the Court of Appeal held that the society was not a charity, and that the fund passed to the Crown as *bona vacantia*, but everybody was dead there, members of the society and annuitants, and the objects of the society had come to an end. In *Braithwaite* v. *Attorney-General* (4), it was held that the surplus of the benefited members' fund, after providing for the annuities, and the whole of the honorary members' fund, belonged to the Crown as *bona vacantia*. But there the entire beneficial interest of the members (save as to two annuitants) was exhausted, and it was decided that the contributions of the honorary members were gifts, and that there was no resulting trust. Here the contributions of the company were gifts to the fund of the society, and were to be lodged with the members' contributions to the credit of the fund, and cannot be got back by the company, who were not members or entitled under the rules at any time to any claim on the fund. The existing members have power by their committee to frame and amend the rules of the society, which is still in existence, and to dispose of the fund as they think proper. There is no resulting trust in favour of the company: *Andrews' Trusts Co.* (5).

M'Gusty, for the Grand Canal Company:—

This is an ideal case of a resulting trust; a fund has been subscribed by two sets of persons for a purpose which cannot be

(1) [1904] 2 Ch. 196.
(2) [1899] 2 Ch. 184.
(3) [1895] 1 Ch. 469; [1896] 2 Ch. 679.
(4) [1909] 1 Ch. 511.
(5) [1905] 2 Ch. 48.

carried out. There may be a resulting trust when the purpose fails as well as when the objects do not exist. The plaintiffs, to succeed, must show that there is a resulting trust, and, if so, both parties should get back their contributions. In *Braithwaite* v. *Attorney-General* (1) there was no resulting trust for the honorary members, but it was never doubted that in the case of ordinary subscriptions to the fund there would have been a resulting trust for the subscribers. The company having subscribed money for sickness and mortality benefits, there is a resulting trust for them, and the funds cannot be used for any other purpose. All that was done here was to form a sick and mortality fund, and there was no society apart from the fund. The resolution of 1878 was to form a fund. Rule 4 of the original rules says: "claims on the fund shall be." That does not imply that this was a dedication of the whole fund to workmen subscribers. At no time could the members have expended the fund except in discharge of the claims allowed by the rules. There was no out-and-out gift to the society. The company did not part with the fund; they had a control over it through their officials who were members of the committee, who had power to frame rules. In *Abbott's Trusts* (2) it was held that there was a resulting trust for the subscribers to the fund, which had been raised for the maintenance and support of the two daughters of Dr. Abbott, and at their death a portion of the fund remained unapplied; there was no declaration of trust there. In *Andrews' Trusts* (3) Kekewich, J., must have held that there was a complet gift for the children, and, therefore, no resulting trust would arise.

As regards the claim to the fund as *bona vacantia*, that is met by rule 11, which provides that the committee may regulate the affairs of the society and frame or amend the rules. They could enlarge the sick and mortality benefits, if they thought fit, and they did so by the amended rules. The argument of the Attorney-General in *Cunnack* v. *Edwards* (4) does not apply here. All the members were dead there. Here further trusts could be declared.

(1) [1909] 1 Ch. 511.
(2) [1900] 2 Ch. 326.
(3) [1905] 2 Ch. 48.
(4) [1895] 2 Ch. 494.

M. R. 1913.

TIERNEY v. TOUGH.

Braithwaite v. *Attorney-General* (1) is really in favour of the company. The Attorney-General made no claim to the fund contributed by benefited members. Sect. 14 of the Friendly Societies Act, 1793, precluded any resulting trust in that case, and that was the ground relied on in the judgment.

Rearden, for the Attorney-General:—

This is a case (*a*) of *bona vacantia*, or (*b*) of a charity. The ordinary doctrine of *cy-près* would apply, as was contended in *Cunnack* v. *Edwards* (2). The only interest which a member has in the fund is that he is entitled to certain benefits, namely, sick and mortality benefits; and, subject to that, he had no interest in the fund. A member could not bring an action against the trustees for a share of the fund. The company voluntarily agreed to contribute certain sums weekly, but they had no beneficial interest in the fund. They could only see, by means of the trustees, that the fund was duly administered. They were mere donors, like the honorary members in *Braithwaite* v. *Attorney-General* (1).

Littledale, *K.C.*, in reply:—

Cur. adv. vult.

1914.

Jan. 20.

O'CONNOR, M.R.:—

The plaintiffs in this action are members of a society which was instituted and maintained for the benefit of boatmen and workmen in the employment of the Grand Canal Company, and they are suing on behalf of themselves and all other members of the society. There are several defendants, the first six being private individuals who form the committee of the society. There is also the Grand Canal Company, sued as a trustee for the society, and also the Attorney-General for Ireland.

The action has been occasioned by the suspension of the business of the society, which was brought about by the operation of the National Insurance Act, 1911. It has become necessary

(1) [1899] 1 Ch. 511. (2) [1895] 2 Ch. 494.

to wind up the affairs of the society, and to determine the claims which are now enforceable against the accumulated funds, which are claimed by the individual members, by the Attorney-General on behalf of the Crown, and, as to a certain proportion, by the Grand Canal Company.

The society is a voluntary one, and has not been registered or incorporated under any Act. It was brought into existence in the year 1878, under the auspices of the Grand Canal Company, whose directors were no doubt influenced by benevolence to their servants, as well as by the consideration that an insurance against sickness and death among their employees must redound to the benefit of employers.

A constitution was framed for the society at its foundation, but on the 19th January, 1891, the constitution was amended; and as the affairs of the society have since been carried on under this amended constitution, it will not be necessary, except in one respect, to go behind it.

The essential provisions of the constitution were as follows:— All boatmen and crews of steamers, and workmen under weekly wages at James's Street Harbour, were qualified as members. Each member was to pay 4*d.* per week, the Grand Canal Company contributing a weekly sum for each member. (Under the original constitution the company contributed a sum equal to the member's subscription, but this was altered.) Any member leaving the service of the company of his own accord, or dismissed from the employment of the company, or struck off the list by the committee as a defaulter, would have no claim on the society's fund on account of past contributions. Provisions were made for allowances during sickness according to a scale regulated by the period of sickness, and also for allowances called "mortality allowances," under which certain payments were to be made for the funeral expenses of a deceased member, or the wife or children of a member, or the father or mother of an unmarried member. There was also a provision for the payment of a gratuity to the widow, or mother, or caretaker of the children, of a deceased member. The management of the society was committed to a committee, three of whom were to be elected annually by the members of the society, and three of them to be officials of the company, and

M. R. 1914.

TIERNEY v. TOUGH.

this committee was given the regulation of the affairs of the society, and the power to frame or amend the rules when requisite. It was further provided that the subscriptions to the fund should be lodged regularly to the credit of the society, and that the company were to be trustees for the society.

These were the main provisions, and there were none others which seem to me to require notice.

Now there are a few features of the constitution which call for observation, as bearing on the questions which are to be decided. In the first place, the members of the society were to be the boatmen, crews, and workmen at weekly wages, and none others. The Canal Company was not made a member. Its only office was to be that of a trustee; but it had three representatives on the committee. The contributions were to become the property of the society exclusively. This is shown by the description of the fund as "the fund of the society," and by the provision for the lodgment of the subscriptions to the credit of the society, that society being made up of certain individuals. Under the constitution which I have briefly sketched, the business of the society was carried on until the passing of the National Insurance Act, 1911. It is obvious that on the passing of that Act there was no purpose to be served by prolonging the existence of the society. The Act had made compulsory what had previously been done voluntarily by the members. If the voluntary payments were continued, both employers and employed would have been duplicating subscriptions for practically the same form of insurance.

It is not surprising then to learn that the members of the society determined not to continue their subscriptions, and in fact no subscriptions have been paid since the passing of the Act, and from that date all business has been suspended.

This gave rise to several questions, which made the present action necessary. Are the several members of the society now entitled to have the funds of the society distributed among them, and, if so, in what proportions? Has the canal company any claim upon the funds? Has the title to the funds gone to the Crown as *bona vacantia*? Are the funds held upon trust for

a charity, and is the trust to be administered *cy-près*, the primary object of the charity having failed?

This is not the first case in which similar questions under somewhat similar circumstances have arisen.

Cunnack v. *Edwards* (1) was a case in which a society had been established to raise a fund by the subscriptions and forfeitures of its members to provide annuities for the widows of its deceased members. In 1848, E. became a member, and remained a member till 1879, when he died a widower. He was the last surviving member, and his personal representatives claimed to be entitled to the unexpended funds. This claim was disputed by the Attorney-General, who was a defendant in the action, and he claimed that a charitable trust affected the fund, and as the primary purpose failed, that the fund should be administered *cy-près*, or, in the alternative, that the fund belonged to the Crown as *bona vacantia*. The personal representatives of one of the deceased members claimed on behalf of the class that there was a resulting trust in favour of all the members in proportion to their contributions and fines. The action was tried by Chitty, J., who decided that there was a resulting trust in favour of the members of the society from time to time, or their respective legal personal representatives, in shares in proportion to the amounts contributed by each member to the funds of the society. This decision was reversed by the Court of Appeal (2), which held that there was no resulting trust; that the society was not a charity; and therefore the unexpended fund was not applicable *cy-près* to charitable purposes, and that the fund passed to the Crown as *bona vacantia*. The reason for the decision was that the entire beneficial interest of each contributor had been exhausted; that each man contributed a certain sum of money to a common fund upon a bargain that his widow, if he left one, was to receive a certain annuity, and beyond this he had no interest whatever in the fund. It was also held that there was no charitable trust, and that the only remaining alternative was that the funds were *bona vacantia*, and belonged to the Crown. I think that that case is very different from the present. Here the members of

(1) [1895] 1 Ch. 489.
(2) [1896] 2 Ch. 679.

M. R. 1914.

TIERNEY v. TOUGH.

the society bargained for benefits for themselves, so that it cannot be said that they have no interest in the fund. The society, though it has ceased business, is not defunct in the sense that it has no members. There are many members in existence, and they constitute the society, to whom the unexpended fund belongs. It is, moreover, competent for the society, through its committee, to amend its constitution, and apply the funds in some way other than that which had been prescribed. If the constitution were now so altered by the committee as to provide for a division of the funds between the members, I do not see how anyone who is not a member, save possibly the Grand Canal Company, could interfere. I think that these considerations get rid of the claim of the Attorney-General on the fund as *bona vacantia*; and it is established that a society of the kind I am considering is not a charity. The remaining alternatives are that the fund belongs to the society, which is nothing more than an aggregation of individuals, or to them and to the Grand Canal Company. I will deal later on with the claim of the company.

The next case in the books is *In re Printers' and Transferrers' Amalgamated Trades Protection Society* (1). In that case the society was registered under the Trades Union Acts, 1871 and 1876, to raise funds by means of weekly contributions to defend and support its members in obtaining and maintaining reasonable remuneration for their labour—in other words, to provide for weekly payments during strikes or lock-outs. There was no provision made for the distribution of the funds on a dissolution of the society. The society was dissolved, and its unexpended funds amounted to £1000. In this case the Attorney-General disclaimed all interest in the fund, and did not claim it as *bona vacantia*, and the mode of distribution was the only matter for settlement by the Court. Byrne, J., held that there was a resulting trust in favour of those who contributed to the fund, and that it was divisible among the members existing at the time of the dissolution. He distinguished the case from *Cunnack* v. *Edwards* (2) by the circumstances that there were there no

(1) [1899] 2 Ch. 184. (2) [1899] 1 Ch. 489.

existing members of the society, and that each contributor parted with his whole interest in his money in favour of a third party, retaining no interest for himself, whereas in the case before him each contributor paid his money for a contingent benefit for himself. That case is very like the present.

I confess, however, that though agreeing in the decision that the fund was divisible among the members of the society existing at the date of the dissolution, I do not think that it can be supported in its entirety by the reason given by the learned Judge, viz.: that there was a resulting trust. As I understand that doctrine, it applies only to a case where the trusts or purposes to which a fund or property is dedicated do not exhaust the whole interest, whereupon such part of the fund or property as is not required for carrying out the trusts or the purposes of the settlement results, or, in other words, goes back to the settlor. Now, this principle would give back to the existing members only so much of the fund as represented their own contributions to it. To this extent the property resulted to them in what I consider to be the proper meaning of the term. But the existing members got something more than what they themselves contributed. The accumulated fund represented more than their own contributions. It was made up in part of the contributions of past members, and, in so far as the existing members were declared entitled to such part, their title must have arisen in some other way than by the doctrine of resulting trust. A resulting trust would have given the fund, so far as subscribed by deceased members, to their personal representatives, and not to other parties. I say then, with great respect, I am not able to follow the reasoning of the learned Judge who decided the *Printers' and Transferrers' Case* (1). It is to be noted that in *Cunnack* v. *Edwards* (2), Chitty, J., who relied on the doctrine of resulting trust, held that the fund was divisible among the respective personal representatives of all the contributors. The conclusion which I have arrived at in the present case is, that the fund belongs to the existing members, and I think that the true reason is to be found in the fact that the accumulated fund is the

(1) [1899] 2 Ch. 184. (2) [1899] 1 Ch. 489.

M. R. 1914.

TIERNEY v. TOUGH.

property of the society, which is composed of individual members. The society is only the aggregation of those individuals, and the property of the former is the property of the latter. This is not a case in which all the members have disappeared, and their claims have been satisfied, or never arose, as in *Cunnack* v. *Edwards* (1). There are here existing members with unsatisfied claims against the fund. As I said before, and I think that this cannot be controverted, if the existing members, with the assent of their committee and their trustee, agreed to divide the fund among themselves, there is no person qualified to call them to account for so doing. The fund is a private one. On the authorities it is clear that there is no charitable trust attaching to it, and I think I have shown that the fund cannot be regarded as *bona vacantia*. The Attorney-General then has no claim.

The only other claim to be considered is that of the Grand Canal Company. They were contributors to the fund, and as such they contend that they are entitled to so much thereof as represents their contributions. The fact that they were contributors is not conclusive in their favour. The question is, did they contribute under such circumstances as to give them a legal interest in the fund, or were their contributions absolute gifts to the society? I think that all the facts point to absolute gifts. The company is not a member of the society. The fund was declared by the constitution, drawn up with the assent and approbation of the company, to be the property of the society. The company was also declared to be the trustee of the fund, and, of course, a trustee for the society. A trustee as such has no beneficial interest. There are only two circumstances which give the shadow of a claim for the company. One is that the maintenance of the society was for the benefit of the company, as well as for the workmen. In a sense, no doubt, it was, but only in the sense that the well-being of employees always redounds to the benefit of their employers. This is not a benefit in the legal sense.

The other circumstance is, that three of a committee of six, to whom the management of the fund was entrusted, should

(1) [1899] 1 Ch. 489.

always be officials of the Canal Company. This, no doubt, gave the company an indirect control over the funds, but it was a control which should be exercised for the benefit of the society, for whom the Canal Company were trustees. It gave no beneficial interest to the trustees.

I am therefore of opinion that the fund is divisible amongst the members of the society who were in existence at the time when the business of the society ceased, and that the fund is divisible among such members and the personal representatives respectively of such of them as have since died; and, following the mode of distribution in the *Printers' and Transferrers' Case* (1), I will declare that the fund is distributable in proportion to the amounts contributed by the members aforesaid.

I will direct an inquiry who were the existing members at the time the business of the society ceased to be carried on, which, I think, it is convenient to fix as of the date of the passing of the Insurance Act; who are the personal representatives (if any) of such of them as have since died; also an inquiry as to the respective amounts contributed by the members aforesaid, and, in case there should be any debts due by the society, an inquiry what claims (if any) there are against the funds by any persons other than members.

I will declare all parties entitled to their costs up to and including the trial, to be paid out of the fund, and reserve further costs.

Solicitors for the plaintiffs: *J. J. Kearns.*
Solicitor for the Attorney-General: *George Collins.*
Solicitors for the other defendants: *Hayes & Sons.*

W. L.

(1) [1899] 2 Ch. 184.

Appeal.
1914.
Feb. 12.

ARTHUR BELL AND JAMES A. DENNING *v.* FRANCES E. PARK, WM. H. ADAMSON, M. A. NICHOLLS, FRANCES E. BELL, AND JANE PLUNKETT (1).

Will—Construction—Several documents together constituting will—Legacies, whether cumulative or substitutional.

A testatrix by her will bequeathed seven legacies to as many legatees, including two legacies to her two executors in case they acted as such; she bequeathed a sum of stock to her executors on trust to pay the income to A for life, then to B for life, and directed that on the death of the survivor the said stock should fall into her residuary estate, which she devised and bequeathed to two persons in equal shares. The testatrix subsequently executed four documents in the nature of codicils; and seven months after the date of the first will executed a second, beginning with the words, "This is my last will and testament," but containing no revocation clause. The second will was almost a copy of the first; the legatees were the same, and were mentioned in the same order. Four of the pecuniary legacies were, however, reduced in amount; one was increased; and two remained unaltered. The bequest of stock was repeated, and the same persons were appointed residuary legatees. All six testamentary documents were together admitted to probate.

Held, by the Court of Appeal (reversing the decision of Barton, J.), that the pecuniary legacies bequeathed by the second document were substitutionary for those in the first, and not cumulative.

This was an appeal from portion of an order of Barton, J., dated the 19th November, 1913, made on the hearing of an originating summons which was brought by the plaintiffs, as executors, for the determination of certain questions arising under the several testamentary dispositions of Frances Elinor Adamson, deceased, which had been admitted to probate as together constituting one will.

The case is reported only on the question whether certain pecuniary legacies bequeathed by testamentary documents

(1) In the Court of Appeal, before O'CONNOR, M.R., and HOLMES and CHERRY, L.JJ.

executed by the deceased on the 13th March, 1911, and on the 23rd October, 1911, respectively, or any of them, were cumulative, or whether the legacies bequeathed by the later document were substitutional.

The testatrix executed six testamentary dispositions of her property. The first of these was a will dated the 13th March, 1911; and the second a codicil thereto dated the 22nd March, 1911; then followed three undated documents, in the nature of codicils, and a second will, which it was agreed by the parties was executed on the 23rd October, 1911. It was also agreed that the three undated documents were executed after the execution of the first, and prior to the execution of the second will.

The two wills are, for the purposes of comparison, printed in parallel columns.

WILL OF 13TH MARCH, 1911.

This is the last will and testament of me, Frances Elinor Adamson, of 13 Rathmines Road, Dublin. I hereby revoke all former wills, and testamentary dispositions at any time heretofore made by me. I bequeath to Mrs. Nicholls, Hill House, Banagher, £300. I give and bequeath to Mrs. Jane Newland, of 62 Wellington Road, Dublin, £500. To Miss Frances Elinor Bell, of same address, £500. To Miss Harriette Kendal Bell £500. To Miss Florence Bell of 62 Wellington Road, Dublin, aforesaid, £500. I give to Major Arthur Bell, of Firville, Mallow, provided he acts as executor and trustee of this my will, the sum of £100. I give to James Alexander Denning, of 12 Trinity Street, in the city of Dublin, solicitor, provided he acts as executor and trustee of this my will, £200. I appoint the said Major Arthur Bell and James Alexander Denning executors and trustees of this my will. I bequeath to them the sum of £500 4 per cent. debenture stock in the Midland Railway

WILL OF 23RD OCTOBER, 1911.

This is the last will and testament of me, Frances Elinor Adamson, of 13 Rathmines Road, Dublin. I bequeath to Mrs. Nicholls, Hill House, Banagher, £200, to Mrs. Jane Newland, widow, of 62 Wellington Road, £500, to Miss Frances Elinor Bell £100. To Miss Harriette K. Bell £100, to Miss Florence Bell, 62 Wellington Road, £100. I give to Major Arthur Bell, Mallow, provided he acts as executor and trustee of this my will, £200. I give to James A. Denning, of 12 Trinity Street, solicitor, provided he acts as executor and trustee of this my will, £200. I appoint Major Arthur Bell and James A. Denning executors and trustees of this my will. I bequeath to them the sum of £500 4 per cent. debenture stock in the Midland Railway Company of Ireland, on trust to pay the annual dividends and income thereof to Mrs. Jane Plunkett of 31 Ashfield Road, Ranelagh, during her said life, and after her death to pay her sister, Miss Harriette Labatt,

Appeal. 1914.

BELL v. PARK.

Company of Ireland, on trust to pay the annual dividends and income thereof to Mrs. Jane Plunkett of 31 Ashfield Road, Ranelagh, during her said life, and after her death to pay her sister Miss Harriette Labatt, of same address, the income thereof for her life, and after the death of the said Mrs. Jane Plunkett and Miss Harriette Labatt, then I direct that said sum of £500 4 per cent. debenture stock in the Midland Railway Company of Ireland shall fall into my residuary estate. As to all the rest residue and remainder of my property of every nature and kind soever, I give devise and bequeath same to Mrs. Frances Elinor Park, of Edgerton Rock, County Wisconsin, and William Henry Adamson, of 1326 Garfield Avenue, Portland, Oregon, to be held by them in equal shares.

FRANCES ELINOR ADAMSON.

The first codicil was as follows :—

This is a codicil to the will of Frances Elinor Adamson. I direct that the dividends and interest on the £500 4 per cent. Debenture Stock of the Midland Railway Company of Ireland shall be paid to Mrs. Jane Plunkett and Miss Harriette Labatt, as in my said will mentioned, and that all duties payable in respect of said legacy shall be paid out of my residuary estate, and save as aforesaid, I confirm my said will.

22nd March, 1911. F. E. ADAMSON.

The three undated documents were as follows:—

In the event of my death, I wish my cousin Frances Elinor Bell to take possession of all my wardrobe and other belongings of mine at 13 Rathmines Road, except will or any securities of property to be handed to my executor Major Arthur Bell, Mallow; if he is absent, to Mr. Denning, my other executor, 10 Trinity Street, Dublin.

Signed by F. E. Adamson, in the presence of F. Keran, and of K. M'Lean.

At my death I wish my cousin Alan J. Adamson, of Winnipeg, to have my silver tea service, viz., teapot, cream-ewer, and sugar-bowl, tongs, also seven silver tablespoons, and eleven silver teaspoons, also a plate chest which

holds them all now in the care of Mrs. A. Nicholls, the Hill House, Banagher.

Signed by F. E. Adamson, in the presence of F. Keran and K. M'Lean.

At my death, I wish my cousin Alan J. Adamson, of Winnipeg, to have my silver tea-service, viz., silver tea-pot, sugar-bowl, cream-ewer, sugar-tongs, eleven silver teaspoons, and seven silver tablespoons, also a plate chest which holds them all, now in the care of Mrs. Mary A. Nicholls, Hill House, Banagher.

Signed by F. E. Adamson, in the presence of F. Keran and K. M'Lean.

The testatrix died on the 5th May, 1912; and in an action, brought in the King's Bench Division (Probate) by the present plaintiffs against the present defendants, judgment was, on the 25th February, 1913, given by Dodd, J., pronouncing for the force and validity of all the above-mentioned documents as together constituting the last will of the testatrix; the learned Judge expressing the opinion that the question as to the legacies being cumulative or not was one to be determined by a Court of construction (see *Townsend* v. *Moore* [1905], P. 66). The present summons having been instituted, Barton, J., held (*inter alia*) that the pecuniary legacies bequeathed by the testamentary document dated the 13th March, 1911, and the testamentary document dated the 23rd October, 1911, were cumulative, with the exceptions of the legacies to the plaintiffs. The latter at no time claimed to be entitled to the legacies bequeathed to them under both documents.

Frances Elinor Park and William Henry Adamson appealed to the Court of Appeal.

Serjeant Sullivan, K.C., and *Edward S. Murphy* for the appellants:—

We contend that the legacies bequeathed by the two wills are not cumulative, but that the second will was substitutional, and intended to take the place of the first. In *Hooley* v. *Hatton* (1), the general principle of law was laid down that where in will and codicil there are bequests of equal, greater, or less sums, the presumption is in favour of the legatee, and the legacies are to be held cumulative. In that case there was no internal evidence of the intention of the testator, and it is well settled that the presumption will be rebutted by slight evidence that the later

(1) 1 Bro. C. C. 390, n.

Appeal. 1914. BELL v. PARK.

bequests were intended to be substitutional. Here there is ample evidence to that effect. The testatrix herself describes the later document as her "last will and testament." It is true it contains no revocation clause, but that is explained by the reason that the introduction of such a clause would have revoked the codicils, which she desired to stand. It is only necessary to compare the wills to see that the later one is copied from the first; the legatees are the same, and mentioned in the same order; in some cases the amounts of the legacies are the same; there are the same executors "of this my will" and the same residuary legatees, and the only reason why the second will was brought into existence was because the testatrix desired to alter the amount of certain of the legacies. Further, in *Hooley* v. *Hatton* (1) the later document was a codicil; here it is a will. In *Heming* v. *Clutterbuck* (2), where a legacy in a second testamentary document was held to be a substitution for one in an earlier will, Lord Eldon distinguished the case from *Hooley* v. *Hatton* (1) as being one of will and will, not will and codicil; and the second gift was there held substitutional, although the two documents had been proved together as a will. In *Jackson* v. *Jackson* (3) Buller, J., relied on the fact that the testator (as here) called the later document his "last will and testament," as evidence that it was a substitution for a former will, not a codicil attached to it. *Kidd* v. *North* (4) is in our favour. In *Tuckey* v. *Henderson* (5) gifts of legacies of different amounts to the same persons, given by two different instruments which were both admitted to probate, were held not to be cumulative; the fact that the legatees were the same in each case (as here) being regarded by the Court as evidence in support of this view. *Wilson* v. *O'Leary* (6), where the legacies in question were held to be cumulative, is distinguishable, as there the legacies were bequeathed by two codicils. So in *Cresswell* v. *Cresswell* (7) Sir G. M. Giffard, V.-C., distinguished the case from *Tuckey* v. *Henderson* (5) as being one where the additional gifts were bequeathed by documents

(1) 1 Bro. C. C. 390, n.
(2) 1 Bli. (N. S.) 479.
(3) 2 Cox, Ch. Cas. 35.
(4) 14 Sim. 463.
(5) 33 Beav. 174.
(6) L. R. 7 Ch. App. 448.
(7) L. R. 6 Eq. 69.

in the nature of codicils, and not by a will. The judgment of Lord Hardwicke in *Duke of St. Albans* v. *Beauclerk* (1) is opposed to *Hooley* v. *Hatton* (2). In *Coote* v. *Boyd* (3) it was held even in the case of will and codicils that the legacies were not doubled. In *Attorney-General* v. *Harley* (4), where the Ecclesiastical Court had decided that three testamentary papers formed one will, the third document was held merely substitutional. See also *Moggridge* v. *Thackwell* (5). No reliance can be placed by respondents on the fact that all the testamentary documents were together admitted to probate. This was in accordance with *Townsend* v. *Moore* (6), where it was held that such was the right course to adopt, so that effect might be given to the documents "so far at any rate as circumstances will permit. How far that could be done would be left to a great extent to a Court of construction to determine." See judgment of Romer, L.J., at p. 84. *Bryan's Estate* (7) shows that a later will may revoke an earlier testamentary disposition, although containing no express clause of revocation.

S. L. Brown, K.C., *Littledale, K.C.*, and *M'William*, for the pecuniary legatees other than the plaintiffs.

This is a pure question of construction. The estate is a solvent one; there was no change of circumstances to induce the testatrix to alter her will; and the presumption of law as laid down in *Hooley* v. *Hatton* (2) must apply, and the legacies accordingly be held cumulative. There is no difference of principle between the case of will and will, and that of will and codicil. In each case the presumption applies, unless rebutted by internal evidence of intention, and there is no such evidence in the present case. The absence of a revocation clause is evidence in our favour. If the testatrix had desired to revoke her former will, she would have done so, but she deliberately omitted the revocation clause which was inserted in the former will. *Wilson* v. *O'Leary* (8)

(1) 2 Atk. 636.
(2) 1 Bro. C. C. 390, n.
(3) 2 Br. Ch. Cas. 521.
(4) 4 Madd. 263.
(5) 1 Ves. Jun. 464.
(6) [1905] P. 66.
(7) [1907] P. 125.
(8) L. R. 7 Ch. App. 448.

Appeal. 1914. BELL v. PARK.

rules the present case. There the legacies were held to be cumulative, although there was actual evidence that they were intended to be substitutional. See also *Mayne* v. *Woodward* (1). *Suisse* v. *Lowther* (2) is to the same effect. It was there said that the presumption is strengthened in the case of the legacies being of different amounts. In cases of doubt the pecuniary legatees are entitled to the benefit of the doubt, and not the residuary legatees: *Lee* v. *Pain* (3). In that case the case of *Duke of St. Albans* v. *Beauclerk* (4) was disapproved of. *Russell* v. *Dickson* (5) and *Brennan* v. *Moran* (6) show that the rule of law should be adhered to.

Serjeant Sullivan, in reply.

O'CONNOR, M.R. :—

This is an appeal from so much of the judgment of Mr. Justice Barton as declares that certain pecuniary legacies bequeathed by two testamentary documents executed on the 13th March, 1911, and 23rd October, 1911, are cumulative. These documents along with four others were admitted to probate, and are as follows :— [His Lordship read the documents, and continued.]

It is to be noted that every person who was a legatee under the earlier document of the 13th March, 1911, gets a legacy under the later document of the 23rd October, 1911. The number of legacies is eight in each document. Of these, four of the legacies in the second document are for smaller amounts. Three are for like amounts, and one is for a greater amount. It is a common case that two of the legacies in the later document must be taken to be substituted for two given to the same legatees in the earlier document—one of the substituted legacies being for a larger sum, and the other for a like sum. There is nothing in the later document to indicate to any lay mind that these two legacies should be treated differently from the other legacies; but, because the motive for the legacies expressed in the first testa-

(1) 31 L. R. I. 154.
(2) 2 Hare, 424.
(3) 4 Hare, 201, at p. 236.
(4) 2 Atk. 636.
(5) 2 Dr. & W. 133 ; 4 H. L. C. 293.
(6) 6 I. C. R. 126.

mentary document is the same as that expressed in the second testamentary document, the law imputes to the testatrix the intention to give the two legacies mentioned in the second testamentary document, in substitution for those in the first. Now, one of these legacies is increased by the later document; the other is for a like amount. Hence the question arises, why should the testatrix by a later instrument give a legacy of like amount as that given to the same person in an earlier instrument—it being admitted that the amounts are not cumulative? No object is to be gained by substituting in a later instrument a legacy for a like amount to the same person, and subject to the very same conditions, assuming that both instruments are to be operative. To my mind the only intelligible explanation is that the testatrix intended the second document to supersede the first. The same observation applies to the appointment of executors in both instruments. The same gentlemen were appointed executors by the later instrument as by the first. This had no meaning if both instruments were to be effective. I do not say that these matters which I have mentioned conclusively give a substitutionary character to the entire of the later instrument, but they certainly suggest it. There is, however, something more for our guidance. Both documents commence in exactly similar terms—"This is the last will and testament of me, Frances Elinor Adamson." Do not these introductory words convey in the strongest way that if there was any previous will it was to be superseded by the later one? Taken in connection with what I have already mentioned, they convince my mind that the entire of the later will was to be in substitution for the first. No doubt the clause of revocation in the first document is omitted from the second, and this point was pressed, and very rightly pressed, by the respondents. It might have proved irresistible if the appellant had only the introductory words to rely upon; but looking at both documents in their entirety—part of the later document being admittedly substitutional, and the legatees in both documents being the same—there seems to be no other conclusion open except that the legacies given by the later were to be in substitution for those given by the earlier.

I cannot, however, pass over the argument of the learned

Appeal. 1914. BELL v. PARK. O'Connor, M.R.

counsel for the respondents, and the reasons given by the learned Judge in the Court below. The rule of law laid down by *Hooley* v. *Hatton* (1) has been relied upon. This is to the effect that two pecuniary bequests in different writings shall be presumed to be cumulative. But this presumption must yield to evidence of intention. Mr. Justice Aston in the case cited commences his judgment by saying: "There is in this case no internal evidence; therefore we must refer to the general rule of law." In other words, he had no evidence of intention, and he was obliged to fall back on a rule of law. Chief Baron Smythe, in his judgment, says: "The intention is the clearest rule; but it is admitted on all hands, here is no internal evidence; we therefore must refer to the rule of law." A like observation fell from Lord Chancellor Apsley. But in the present case, I think that there is internal evidence sufficient to relieve the Court from the necessity of falling back on a rule of law for the purpose of construing the document. *Heming* v. *Clutterbuck* (2) is strongly relied upon by the appellants. Lord Eldon, in his judgment, points out that in *Hooley* v. *Hatton* (1) the second instrument was a codicil, while in the case before him it purported to be a will, just as in the present case; and undoubtedly he considered that the circumstance that the second instrument purported to be a will favoured the view that the legacy thereby given was substitutional. Sir John Leach, V.-C., before whom the case originally came, and whose judgment was upheld, relied very strongly on the circumstance that the second instrument purported to be a will. It was described, as in the present case, as the last will and testament of the testator.

Wilson v. *O'Leary* (3) may be described as an extreme case. To my mind it is principally important for the illustration it affords of an unsatisfactory result achieved by the coercive application of a rule of law for determining a testator's intention. Owing to the absence of all legal evidence in that case of the testator's intention, the Court felt coerced to follow the rule of law, Sir W. M. James saying that it was "not to be frittered away by a

(1) 1 Bro. C. C. 390, n.
(2) 1 Bligh (N. S.) 479.
(3) L. R. 7 Ch. App. 448.

mere balance of probabilities." In the present case we have a more reliable guide than a mere balance of probabilities. We have portions of the later document unmeaning if the first document was intended by the testatrix to remain effective. We have, further, the declaration by the testatrix that the second document was her last will and testament, a declaration which, though not by itself sufficient to revoke a previous will, leads the reader to suppose that there is no other will; and which, taken in connection with its contents, leaves no other conclusion open.

I therefore think that the appeal ought to be allowed, so far as the appellants ask to have it declared that the legacies, declared to be cumulative in the Court below, are substitutional. As the appellants admit that the remaining portion of their appeal cannot be sustained, we think that the costs of all parties should be paid out of the residuary estate.

HOLMES, L.J.:—

The subject of this appeal is the construction of the testamentary dispositions made by Frances Elinor Adamson, who died on the 5th May, 1912. She had duly executed six such documents. The first was a will dated the 13th March, 1911, evidently prepared by a solicitor, by which she revoked all former wills and testamentary dispositions. The second was a codicil thereto, executed a few days later, also prepared by a solicitor, and directing that all duties payable in respect of a certain legacy given by the will should be paid out of her residuary estate. The third, which, although not called a codicil, is evidently intended to be such, directs a cousin, Frances Elinor Bell, to take possession of all her wardrobe, and other belongings at 13 Rathmines Road, except her will or any securities of property to be handed to Major Bell, one of her executors, and, if he were absent, to her other executor, Mr. Denning. The testatrix was then, and during all the period within which the six documents were executed, residing as a lodger at 13 Rathmines Road. The documents four and five are in the same words, and purport to bequeath to Alan J. Adamson, of Winnipeg, certain articles of plate, in a plate chest, then in the care of Mrs. Nicholls, the Hill House, Banagher. None of the three last-mentioned

Appeal. 1914.

BELL v. PARK

Holmes, L.J.

documents is dated; but it is admitted that they were executed after the will, and before the sixth document to which I now refer. It bears no date, but the parties agree that it was executed on the 23rd October, 1911, and begins with the words, "This is the last will and testament of me, Frances Elinor Adamson." It purports to dispose of all the property of the testatrix, except perhaps the articles to which the second, third, and fourth codicils refer; and the matter to be decided in this appeal is whether it is substituted for, and takes the place of, the will of 13th March, 1911. Mr. Justice Dodd allowed the six instruments to be proved; but, in doing so, he gave no decision as to whether or not the will last executed was substituted for the first. His opinion and intention were, that this was a matter to be construed by the Chancery Division; whereupon there was issued the summons resulting in the order now under appeal.

The testatrix is said to have been a lady of education and intelligence, who wrote the second will with her own hand, without the knowledge of her solicitor. It is evident that at the time she had the will of the previous March before her, and that she must have read it, paragraph by paragraph, as she wrote. The opening words, already quoted, were the same as those with which the previous will began; but the following clause: "I hereby revoke all former wills and testamentary dispositions at any time heretofore made by me," is omitted in the second will. Then follow in both wills five pecuniary legacies to five ladies, to whose names the same addresses are added in both documents. To these ladies the following pecuniary legacies are given by the March will—£300, £500, £500, £500, and £500. The October will gives three legacies of £200 each, and legacies of £500, £100, £100, £100, and £500. It will be seen that in one instance the same sum is given in the two wills, while in the four other cases smaller sums are given by the second will. Then there comes, in both wills, the appointment of Major Bell and James A. Denning, executors and trustees "of this my will," with the bequests in the first will of £100 to Bell and £200 to Denning, provided each acts as executor and trustee. In making this appointment, and in giving these bequests, precisely the same language is used in both instruments, except that the

gift to Bell becomes in the second £200 instead of £100. Then follows a bequest to the executors and trustees of £500 4 per cent. Debenture Stock in the Midland Railway Company of Ireland, upon trust to pay the annual dividends and income thereof to one lady for life, and after her death to pay the income thereof to another lady for her life, with a direction that after the death of both, the said sum of £500 stock should fall into the residuary estate. I have given the purport of this legacy without copying all the words; but the language in both instruments is identical. Then follows in the first will: "As to all the rest residue and remainder of my property of every nature and kind soever, I give, devise, and bequeath same to Mrs. Frances Elinor Park, of Edgerton Rock, county Wisconsin, and William Henry Adamson, of 1326 Garfield Avenue, Portland, Oregon, to be held by them in equal shares." This residuary gift becomes in the second will, "all other moneys of mine I give and bequeath to Mrs. Frances Elinor Park, of Edgerton Rock, county Wisconsin, and to William Henry Adamson, of 1326 Garfield Avenue, Portland, Oregon, to be held by them in equal shares." We thus see that, including the gift of the residue, there are bequests in each will of eleven legacies to the same eleven persons. Of these, six legatees receive the same legacies in both wills; four are given in the second will legacies smaller in amount than what they would receive under the first; and to one a larger sum is given by the second. We have no evidence of what led the testatrix to write the October document. It does not appear that any change had taken place in the extent or character of her property, or in her relations to the legatees, who had not changed their residences after the will of March. Whether the testatrix intended that the second will was to be substituted for the first, or whether both were to stand, and each legatee was to receive the bequests given to him and her by both wills, depends upon the intention to be inferred from their contents.

Little assistance is to be gained from legal principles laid down in previous decisions. There is a rule that where a legacy is given by a will and by a codicil thereto to the same person, these legacies, in the absence of something showing a contrary intention, are cumulative. There is also, I think, a rule that

Appeal. 1914. BELL v. PARK.

where two pecuniary legacies are given by the same will to the same person, they are not cumulative; but rules of this kind give no help in the present case.

Holmes, L.J.

I am, however, of opinion that the contents of the documents are sufficient to show the intention of the testatrix. She begins the October will with the words—"This is the last will and testament of me, Frances Elinor Adamson." Now, I cannot believe that a lady of intelligence would have written these words if she intended that not only this, but another document, were both to be regarded as her last will. Furthermore, the will of October contains a complete and exhaustive disposition of all her property. I could understand, if it only disposed of portion thereof, that she intended that the two were to be read together, in which case I would be prepared to hold that, notwithstanding the opening words, the legacies were cumulative; but I cannot draw this inference where the disposition is complete. Again, both documents contain these words—"I appoint the said Major Arthur Bell and James Alexander Denning executors and trustees of this my will." Why should she repeat this appointment in the second if she had already made it in the first, unless she intended that the first was to cease to be operative? I have called attention to the legacies to each of these gentlemen provided he acts as executor and trustee "of this my will"; £200 to Denning in both documents, and £100 to Bell in the first and £200 in the second. Barton, J., has held that, while all the other pecuniary legacies are cumulative, these are substitutional. But is it possible to believe that the testatrix regarded them as different from all the other legacies?

I now come to a matter which the respondents' counsel think is in their favour, but which seems to me to be against them. In the first will prepared by the solicitor, after the opening words already quoted, there follows—"I hereby revoke all former wills and testamentary dispositions at any time heretofore made by me." This clause does not appear in the subsequent will; and it is argued that this shows an intention not to revoke the former will. I am of opinion that this is not the reasonable inference from the omission. I think her object was to preserve, not the will which she was replacing by another, but the intervening

codicils. I am satisfied that she desired that these codicils should continue operative. I have already called attention to the difference between the residuary gifts in the two wills. The first is in the language used by lawyers in disposing of all the property of every kind not previously disposed of. The testatrix had no real estate; and she possessed very little personal property except what, in ordinary as well as legal language, would be described as "moneys." Living in lodgings, she had not even the furniture of a house; but there were in her lodgings her wardrobe and other personal belongings which, by one of the codicils (as I interpret it) she gave to her cousin, Frances Elinor Bell. She had also a plate chest in Hill House, Banagher, which by two of the codicils she bequeathed to Alan J. Adamson. In this state of things, when she was reading the first will before writing the second, she observed the general residuary gift, and she thought that if she were to use the same language it would include these articles. Therefore, she alters the terms of the residuary gift into "all other moneys of mine." This accounts for the omission of the clause of revocation. It was not needed in relation to the previous will, inasmuch as she was substituting for it another will, and she desired the codicils to be retained. Although the testatrix was no lawyer, she was an acute-minded lady, who understood what she wanted, and, in my opinion, conveyed it with reasonable clearness in her holograph document. I may observe that while after the words "all other moneys of mine" she returns to the language of the March will, she omits from it one word—"devise." I wonder did this arise from an idea that the word would be inappropriate where there was no real estate.

I have already said that no great help can be obtained from authority; and I propose to refer to only two cases.

I can find no decision that more nearly resembles the present than *Heming* v. *Clutterbuck* (1). In that case the Ecclesiastical Court had admitted both documents to probate, and the second began with the words—"This is my last will and testament." Legacies were given in both to the same persons, and apparently in each the property was wholly, or almost wholly, disposed of.

(1) 1 Bli. (N. S.) 479.

Appeal. 1914.

BELL v. PARK.

Holmes, L.J.

The Vice-Chancellor held it was a clear case of substitution. Lord Eldon, in moving the judgment of the House of Lords, expressed the opinion that it was one of the most difficult cases he ever had to deal with, but the judgment appealed from was affirmed. According to James, L.J., in *Wilson* v. *O'Leary* (1), Lord Eldon proceeded entirely, or almost entirely, upon the fact that the two instruments were admitted to probate by the Ecclesiastical Court as one will, and that the second instrument began with the words—"This is my last will and testament," from which he derived the conclusion that it was intended to be substitutional. The Lord Justice added that he thought that the Court of construction acted on a sort of feeling that in truth the one instrument was intended to be an entire substitution for the other. The only difference between this and the present case is that there are stronger grounds in the latter for inferring substitution. *Wilson* v. *O'Leary* (2) is the best case from the respondents' point of view, but, just as James, L.J., said that *Heming* v. *Clutterbuck* (2) was so entirely distinct from *Wilson* v. *O'Leary* (1), he did not think it necessary to make any further observations upon it; so I say that for a like reason a short reference to the latter is sufficient. In it there was a will with two codicils, and the question arose as to whether certain legacies given in both codicils to the same persons were cumulative or substitutional. There was nothing in either codicil resembling the words "this is my last will and testament." There was, however, a letter from the testator's solicitor that suggested to him to recopy the first codicil. This was held not to be evidence, and in its absence there was nothing from which it could be inferred that the gifts were not cumulative. This does not resemble the case with which we are now dealing.

For these reasons, I hold that the appeal must be allowed, and that the order of Barton, J., should be set aside, except so much of it as declares that the specific gifts mentioned in the undated testamentary documents are not revoked, and also except so much thereof as relates to costs; and that it be declared by this Court that the will of the 23rd October, 1911, and all the legacies and bequests therein, are in substitution for the will of the

(1) L. R. 7 Ch. 448. (2) 1 Bli. (N. S.) 479.

13th March, 1911, and the legacies and bequests therein. There is some doubt whether the codicil of the 22nd March, 1911, applies to the bequest of £500 4 per cent. Debenture Stock in the will of October; but we are relieved from considering this by the consent of the residuary legatees that it be declared that it is applicable thereto. This consent will be recited in our order.

CHERRY, L.J.:—

The testatrix in this case duly executed two documents, each purporting to be her last will and testament, and between the dates of the two wills, four codicils. One only of these codicils is dated, but it is not disputed that the other three were executed during this period. All six documents have been admitted to probate by the order of Dodd, J., and the question for our decision is whether the legacies in the second will are substitutionary for those in the earlier will, or whether they are cumulative.

It is perfectly evident, upon a perusal of the two documents, that the earlier one was used as a draft for the preparation of the later one. The opening words are the same, "This is the last will and testament of me, Frances Elinor Adamson." The same executors are named, and the legacies to each are, in both wills, made conditional upon their acting as such. The legatees, other than the executors, are exactly the same individuals in the two wills, and their names are placed in exactly the same order. All these circumstances, in my opinion, point to the conclusion that the second will was intended as a substitution for the first. It appears to me to be extremely unlikely that the testatrix, if she was intending additional bounty by the second will, should have mentioned all the legatees in her first will, and no other person whatsoever. It is not likely that she would have repeated her appointment of executors, and the legacies to them, which it is admitted are not cumulative; or that she would have repeated her gift of the residue, which, in that point of view, would have been entirely unnecessary.

Mr. Brown contended very strenuously that it was an inflexible rule for the construction of wills that two gifts to the

Appeal. 1914. BELL v. PARK. Cherry, L.J.

same person, in different documents, whether they were of the same or of greater or less amount, were to be treated as cumulative, unless there was a reason mentioned for the gift. Such gifts are undoubtedly prima facie cumulative, but it is always permissible to show by the terms of the two instruments that the gifts by the later document were intended to be substitutional and not cumulative. *Tuckey* v. *Henderson* (1) was a case very like the present one. There, as here, there were two wills, both of which were admitted to probate; the legatees in each were nearly, though not exactly, the same persons, and the amounts of the legacies varied in the two instruments. The legacies were held to be substitutionary, chiefly upon the ground that the later document was described as a will. "It is true," says Romilly, M.R., "that both are wills of the testatrix, and that both are admitted to probate, and that it is, therefore, simply a question of construction. But, as a question of construction, I am of opinion that the second is substitutionary for the first, as regards the legacies in the first will to legatees who are also named as legatees in the second. This differs from the case of a codicil: a codicil is professedly an addition to the will, but this is professedly a substitution for it" (2). This decision was cited with approval by Giffard, V.-C., in *Cresswell* v. *Cresswell* (3), and is an express authority, if authority be needed, for the view we are taking in the present case.

The only circumstance which appeared to me to point to the opposite conclusion, namely, that the legacies were cumulative, was that the second will contained no clause of revocation, and as the omission was manifestly intentional, having regard to the close resemblance between the wording of the two documents, it was argued, with some force, that the testatrix, by omitting this clause, intended the two wills to have a cumulative effect. The answer to this argument is the existence of the four codicils, executed after the date of the first will, and before that of the second. If the testatrix desired these codicils to be given effect to, she would

(1) 33 Beav. 174.
(2) *Ib.* 176.
(3) L. R. 6 Eq. at p. 76.

naturally omit the general clause of revocation, and this, I think, was clearly her intention.

Solicitors for the plaintiffs : *Hoey & Denning.*

Solicitors for the defendants Frances E. Park and William H. Adamson : *O'Connor & Dudley.*

Solicitors for the defendant Frances E. Bell : *James Henry & Son.*

Solicitor for the defendant M. A. Nicholls : *James H. M'Laughlin.*

R. ST. J. C.

GREENE *v.* IRISH LAND COMMISSION.

Administration—Crown debt—Priority—Irish Land Commission—Debt due to—Nature of.

G., an Inspector and Assistant Commissioner of the Irish Land Commission, had in his hands certain moneys which came to the Irish Land Commission from the Consolidated Fund, or from moneys provided by Parliament, to be applied to certain specific statutory purposes. Before he had applied the moneys to the statutory purposes he died, and in a suit for administration his estate was found liable therefor to the Irish Land Commission. The Irish Land Commission claimed priority over the other creditors in respect of the debt thus arising, as a debt due to the Crown.

Held, that the debt was a Crown debt, and was entitled to priority as such.

ADJOURNED SUMMONS.

R. W. Greene, an Inspector and assistant Land Commissioner of the Irish Land Commission, died on the 15th January, 1913. In the administration of his estate, which was insolvent, it appeared that in the exercise of his duties as Assistant Land Commissioner he had received certain moneys, the particulars of which are stated below, and had not accounted for the same to the Irish Land Commission. The Irish Land Commission claimed priority over the other creditors for the payment of these moneys on the ground that they were moneys due to the Crown.

The particulars of these moneys were as follows :—

(*a*) The Irish Land Commission by the Irish Land Act, 1903, sect. 12, sub-s. 1, is empowered to execute such works as may

Barton, J. 1914.

GREENE v. IRISH LAND COMMISSION.

appear expedient for the benefit or improvement of estates, or untenanted land, or generally for the purposes of that Act. Up to May, 1911, the necessary funds for that purpose were provided by a fund called the Reserve Fund, established under the Purchase of Land (Ireland) Act, 1891, sect. 5, which, in its turn, was fed by annual grants from the Consolidated Fund. When the Reserve Fund became exhausted in May, 1911, the moneys for the above purposes were, under the Irish Land Purchase Act, 1909, sect. 28, sub-s. 1, annually voted by Parliament up to an amount approved by the Treasury in each year.

The deceased was entrusted with sums of money arising from either one or other of these sources for the purpose of carrying into effect such improvements, and at the time of his death there was £587 5*s.* 3*d.* unapplied and unaccounted for by him.

(*b*) The Irish Land Commission have power to make temporary grazing lettings of lands purchased by them. The grazing rents are collected by their inspectors, and are applied by the Land Commission in payment of the interest on the advances made out of moneys provided by Parliament for the purchase of such lands. The deceased had in his hands at the time of his death £124 10*s.* on foot of such grazing rents.

(*c*) Where the Irish Land Commission do not advance the full sum required for the purchase of tenanted holdings, the balance is paid by the tenant and collected by the inspector. The deceased had in his hands at the time of his death £25, moneys so collected.

Having regard to the small amount of Mr. Greene's estate, it became unnecessary to give any decision as to items (*b*) and (*c*). The decision of the Court was limited to item (*a*).

R. W. W. Littledale, K.C. (with him, *J. R. Peart*), for the plaintiff, the administratrix of R. W. Greene :—

This is not a Crown debt. It could only be a Crown debt if it is shown—(*a*) that the Land Commission are a department of the Treasury; (*b*) that the moneys due are earmarked as Crown moneys.

The Land Commission are an ordinary body corporate, established by statute with a common seal and a capacity to

acquire and hold land for certain purposes: Land Act, 1881, sect. 42. They are liable to mandamus: *R.* v. *Irish Land Commission* (1); to certiorari: *Gosford's Case* (2); and can be ordered to pay costs. It cannot be said that the Land Commission are a branch of the Treasury. Their only connection with it is that they borrow moneys from it to be repaid with interest. They have an unlimited discretion, subject to the statutes, as to the application of the moneys in their hands, and are not subject to the Treasury as regards the exercise of such discretion.

If, then, the Land Commission are not a department of the Treasury, and as such entitled to the rights of the Crown, they must show that the moneys which they wish to recover are Crown moneys. The moneys coming to the hands of the Land Commission, and applied from time to time by them, have at different times been derived partly from the Consolidated Fund, partly from county levies, mixed together. These moneys have always been absolutely under the control of the Land Commission, subject only to the audit of their accounts. Instalments from purchasing tenants have also come to their hands. These are collectable as tithe rentcharges, *i.e.*, as rents against which the Statute of Limitations runs: *Irish Land Commission* v. *Grant* (3). It is impossible to say that all these moneys are Crown moneys, or to segregate moneys of the Crown from moneys of the subject. It has not been satisfactorily shown from which source the moneys entrusted to the deceased came. He was entrusted with various sums not in any way earmarked, and was accountable to the Land Commission, not to the Treasury. The case of the *Attorney-General* v. *Howley* (4) has no application, for it was admitted there that the moneys were, and had always been, Crown moneys.

[He also cited Landlord and Tenant (Ireland) Act, 1870 (33 & 34 Vict. c. 46), sects. 47, 48, 49; Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), sects. 28, 30, 35, 36, 41, 42, 43, 44, 48; Purchase of Land (Ireland) Act, 1891 (54 & 55 Vict. c. 48), sect. 5, sub-s. 2; Irish Land Act, 1903 (3 Edw. 7, c. 37), sect. 12, sub-s. 1; Irish Land Act, 1909 (9 Edw. 7, c. 42), sect. 28, sub-s. 11.]

(1) [1894] 2 I. R. 394.
(2) [1899] 2 I. R. 399.
(3) 11 L. R. I. 430.
(4) [1913] 1 I. R. 455; [1914] 1 I. R. 124.

Barton, J.
1914.

GREENE
v.
IRISH LAND COMMISSION.

Herbert Wilson, K.C. (with him, *Edmund Meredith*), for the Irish Land Commission :—

These are Crown moneys, moneys voted by Parliament for the work of the Irish Land Commission. The Land Commission was bound to account for them to the Crown ; the deceased was bound to account to the Land Commission. Any person who has in his hands moneys of the Crown is an immediate debtor to the Crown : *R.* v. *Wrangham* (1) ; *In re West London Commercial Bank* (2) ; *Attorney-General* v. *Leonard* (3) ; *In re Churchill* (4).

Littledale, K.C., in reply.

BARTON, J. :—

This summons is brought by the administratrix of the late Mr. Robert W. Greene to obtain the opinion of the Court with reference to a debt due by Mr. Greene at his death in respect of moneys for which he was accountable to his superiors in the Irish Land Commission in his official capacity as an assistant commissioner and acting inspector under the Estates Commissioners. The question is, whether these moneys were moneys of the Crown. If so, the Crown can claim priority in the administration of Mr. Greene's estate over all other creditors of equal degree. In order to answer that question, it is necessary to ascertain how these moneys were provided, and what was the relation of the Land Commission to the Crown in respect of them.

I agree with Mr. Littledale that this case is not governed by *Howley's Case* (5), which was recently decided in the Court of Appeal. The question is quite different, and has no bearing upon any of the ordinary transactions of the Land Commission with tenant purchasers or others to whom they are authorized to advance moneys.

Section 12, sub-s. 1, of the Irish Land Act, 1903, enabled the Land Commission " to take such steps and to execute or cause to be executed such works as might appear expedient for the benefit

(1) 1 Cr. & Jer. 408.
(2) 38 Ch. D. 364.
(3) 38 Ch. D. 622.
(4) 39 Ch. D. 174.
(5) [1913] 1 I. R. 455 ; [1914] 1 I. R. 124

or improvement of estates or untenanted land purchased or proposed to be purchased under the Act, or for the use or enjoyment thereof or generally for the purpose of the Act." Money for carrying sect. 12, sub-s. 1, into effect was provided by sect. 43, which enabled the Treasury, at a request and upon a certificate from the Land Commission to advance the requisite sums out of the "Reserve Fund," which under sect. 5, sub-s. 2(*b*), of the Purchase of Land Act, 1891, consisted of the Exchequer contribution of £40,000 a year paid annually from the Consolidated Fund, until it reached £200,000. As time went on, the reserve fund became depleted, and it was provided by sect. 28, sub-s. (1), of the Land Act of 1909 that, when the reserve fund should be exhausted, any money required for the purpose of sect. 12, sub-s. 1, of the Act of 1903 should, up to an amount approved by the Treasury, be paid out of moneys provided by Parliament. The Land Commission were rendered accountable under Treasury regulation for the application of all such moneys, and provision was made for the audit of these accounts and for repayment and recoupment in certain events and under certain conditions, to the reserve fund or the Exchequer.

Mr. Greene was an officer of the Land Commission, and was entrusted with moneys which were provided in one or other of these ways, and were to be applied by him for the purpose specified in section 12, sub-s. 1, of the Act of 1903. Before the moneys were actually applied by him to any of these purposes, he died, and his estate has been found liable in respect of them. Were these moneys, which were in Mr. Greene's hands, moneys of the Crown? In my opinion they were. They came to the Land Commission from the Consolidated Fund, or from moneys provided by Parliament, to be applied by the Land Commission for certain specific purposes, and the Land Commission were accountable to the Treasury for the application of the moneys and for unexpended balances, if any. Until such moneys were actually applied by the Land Commission to these statutory purposes, they remained moneys of the Crown, in the hands of the agents of the Crown; and in the administration of the estate of their agent the Crown is entitled in respect of them to priority over creditors of equal degree.

Barton, J.
1914.

GREENE
v.
IRISH LAND COMMISSION

In order to make the matter perfectly regular, the Attorney-General will, as stated by Mr. Wilson, enter an appearance, and his costs will be provided for.

Solicitor for the plaintiff: *R. A. Macnamara.*
Solicitor for the Irish Land Commission: *William Alexander.*

E. C. F.

Ross, J.
1913.
Dec. 10, 17.
1914.
Feb. 27.

IN THE MATTER OF THE ESTATE OF ELEANOR MARY CHUTE AND LOUISA HAWKESWORTH KELLY, OWNERS; THE NATIONAL BANK, LIMITED, PETITIONERS.

Mortgage—Priority—Mortgage to bank to secure present and future advances—Subsequent mortgage by mortgagor "as beneficial owner"—Appropriation of payments—Rule in Clayton's Case—Marshalling securities.

Q. in 1894 mortgaged certain lands and a policy of assurance to a bank to secure all moneys then due or to become due, with interest. In 1897 he, "as beneficial owner," mortgaged the lands, but not the policy, to F. to secure £700 and interest. F. had notice at the time of the prior mortgage to the bank. Notice of the mortgage to F. was given by F. to the bank on the 17th March, 1897, when a sum of £1963 was due by Q. to the bank, for which he had given them promissory notes payable three months after date. The bank continued the account with Q. as one unbroken account, instead of opening a fresh account. The notes had been originally given in 1895 and 1896, and were renewed from time to time down to 1903, and since remained unpaid. The practice had been that when the notes became due they were debited to Q.'s current account, were at once renewed, and the amount credited to the account. Subsequent to 17th March, 1897, Q. paid into his current account in the bank £4000 in cash. His account with the bank was closed on the 30th June, 1904, and then showed an overdraft due to the bank of £1654 in addition to the amount due on foot of outstanding notes. Q. died in 1908.

Held, that the rule in *Clayton's Case* (1 Mer. 572) was not excluded by the conduct of the parties, and that F.'s mortgage had priority as against the lands to the bank's charge.

On Q.'s death the bank received the amount of the policy moneys, and claimed to be entitled to apply them towards the discharge of the amount of the overdraft due on the 30th June, 1904, with interest, leaving the sum of £1963 and interest still charged on the mortgaged lands.

Held, that F. had the right to compel the bank to discharge *pro tanto* the debt due to them on the 17th March, 1897, out of the policy moneys, in exoneration of the lands subject to F.'s mortgage.

MOTION TO SETTLE PRIORITIES.

The estate for sale was formerly the absolute property of Albert W. Quill, who died in 1908. The late Albert W. Quill, being a customer of and indebted to the National Bank, mortgaged to the bank the lands sold in the present matter, to secure all present and future advances, with interest. On the same day, by another deed, he mortgaged to the bank, for the same purposes, a policy on his own life for £2000 effected with the North British Insurance Company. The bank from time to time made advances on foot of these securities by allowing Quill to overdraw his current account to a large extent. In addition to the above securities the bank took promissory notes from Quill, payable in each case so many months after date. The notes had originally been given in the years 1895 and 1896, and were renewed from time to time down to the 18th July, 1899, when £100 was paid off. From that time they were renewed from time to time till the 29th January, 1903, when they all became due, and since remained unpaid. The practice was, that when the notes became due they were debited in Quill's current account. When they were renewed, the amount was immediately credited to his account.

On the 16th March, 1897, Quill, "as beneficial owner," mortgaged the lands comprised in the bank's security to John Ford, to secure £700 with interest. Ford gave notice of his mortgage to the bank on the 17th March, 1897. On that date Quill's account with the bank stood thus:—Promissory notes, £2500; cash credit, £536 1*s.* 9*d.*; total secured liability to the bank, £1963 18*s.* 3*d.* On receipt of the notice of Ford's mortgage, the bank did not rule off or break Quill's account, or strike a balance, or alter in any way their method of dealing with Quill's account and of renewing the promissory notes. Quill subsequently paid into the bank to the credit of his account over £4000 in cash, irrespective of credits for renewals of notes. Quill's account with

Ross, J. 1913. *In re* CHUTE'S ESTATE.

the bank was closed on the 30th June, 1904, and then showed an overdraft due by him to the bank of £1,654 2*s.* 6*d.*, in addition to the amount due by him to the bank on the promissory notes. On Quill's death in 1908 the bank received from the North British Insurance Company the sum of £2,394 10*s.* on foot of the policy of assurance. This sum the bank contended that they were entitled to appropriate as follows:—To the payment of premiums, £270 14*s.* 3*d.*; to overdraft and interest thereon, £2017; a small sum for costs; and the balance, £101 14*s.* 2*d.*, to interest due on foot of the promissory notes, leaving, as the bank contended, a sum of £2400 still due to them with interest in respect of Quill's indebtedness to the bank on the 17th February, 1897.

The bank now claimed, as against and in priority to Ford, to be paid out of the lands sold in the matter this sum of £2400, with £1321 1*s.* 3*d.* interest thereon up to June, 1913.

Herbert Wilson, K.C., for the National Bank, Ltd.:—

Admittedly the bank cannot claim in priority to Ford moneys advanced after the 17th March, 1897: *Hopkinson* v. *Rolt* (1). Their claim is to apply towards such subsequent advances the proceeds of the North British policy, leaving the debt due on the 17th March, 1897, charged on the lands in priority to Ford.

T. S. M'Cann, K.C., and *E. F. Leet*, for the representatives of John Ford:—

The account between Quill and the bank is one continuous and unbroken current account, with balances communicated periodically to the customer. By the combined operation of the rule in *Clayton's Case* (2), and the principle of *Hopkinson* v. *Rolt* (1), the entire liability of Quill due to the bank on the 17th March, 1897, was, as against Ford, wiped out by the subsequent dealings in the account. The system followed by the bank of taking renewals of the promissory notes from Quill cannot exclude the operation of the rule in *Clayton's Case* (2), because after the 17th March, 1897, such renewals were, as against Ford, void as

(1) 9 H. L. C. 514. (2) 1 Mer. 572.

purporting to vary in a material respect Quill's liability as it stood on the 17th March, 1897. The bank treated those bills as cash; therefore, as between the bank and Ford, their debt was paid off: *Deeley* v. *Lloyd's Bank* (1). On getting notice of Ford's mortgage, the bank ought to have combined all Quill's accounts and set off his credit balance against the outstanding liability on the notes: *Mutton* v. *Peat* (2). In the alternative, Ford's mortgage contained covenants against incumbrances, and for title and further assurance; therefore on the 17th March, 1897, when the bank received notice of Ford's mortgage, Ford was entitled to have the bank's debt discharged out of the policy moneys in exoneration of the lands, and the lands became liable to so much only of the then liability of Quill to the bank as the policy moneys when realized would be insufficient to discharge: *Averall* v. *Wade* (3); *Ocean Accident Co.* v. *Collum* (4); *Roche's Estate* (5); *Ker* v. *Ker* (6); *M'Carthy* v. *M'Cartie* (7). The operation of covenants for title is not affected by the knowledge of the covenantee of prior incumbrances: Norton on Deeds, p. 563; *Page* v. *Midland Railway Co.* (8).

Herbert Wilson, K.C., in reply:—

The rule in *Clayton's Case* (9) is merely a presumption, and is not to be used contrary to the intention of the parties: *Deeley* v. *Lloyd's Bank* (10); *City Discount Company* v. *M'Lean* (11). In three unreported cases in the Master of the Rolls' Court, it was held that the rule in *Clayton's Case* (9) does not apply to bank accounts where bills are renewed and passed through the account. The doctrine in *Averall* v. *Wade* (3) is founded on specific performance; but knowledge of an incumbrance destroys the equity to get specific performance based on covenants against incumbrances. There was no reality in the covenants for title in Ford's mortgage: *Tighe* v. *Dolphin* (12).

Cur. adv. vult.

(1) [1910] 1 Ch. 648; [1912] A. C. 756.
(2) [1900] 2 Ch. 79.
(3) L. & G. temp. Sugden. 252.
(4) [1913] 1 I. R. 337.
(5) 25 L. R. Ir. 271.
(6) I. R. 4 Eq. 15.
(7) [1904] 1 I. R. 100.
(8) [1894] 1 Ch. 11.
(9) 1 Mer. 572.
(10) [1912] A. C. 756.
(11) L. R. 9 C. P. 692.
(12) [1906] 1 I. R. 305.

Ross, J.
1914.

In re CHUTE'S ESTATE.

Feb. 27.

Ross, J.:—

By a deed of 11th August, 1894, Albert Quill mortgaged to the National Bank the lands comprised in the absolute order, to secure all moneys then due or to become due, with interest; and by the same deed he also assigned, by way of further security, his interest in a policy of assurance effected with the Provident Life Office. On the same day, by another deed, he mortgaged to the said bank, for the same purposes, a policy on his own life for £2000 effected with the North British Insurance Company.

By a deed of 31st December, 1896, the said Albert Quill executed a further charge on the said premises to the said bank, and by another deed of 28th October, 1904, he executed a further charge on the said premises. On the 10th March, 1897, the said Albert Quill mortgaged the said lands and the said first-mentioned policy to James Ford, to secure £700 and interest; and on the 17th March, 1897, the bank received notice of this mortgage. On the 1st February, 1908, the said Albert Quill died, and thereupon the bank received from the North British Insurance Company a sum of £2394, being the amount payable with bonus additions.

Of this sum the bank contend that they are entitled to apply £270 to the payment of premiums, and interest thereon; a sum of £2017 in respect of the overdrawn account up to 30th June, 1904, and interest; a small sum for costs of the mortgage of 1904; and the balance of £101 to the debt due by the mortgagor on foot of promissory notes. On the 30th June, 1904, a sum of £2400 was due by the said mortgagor to the bank on foot of these promissory notes. The notes had originally been discounted in the years 1895 and 1896, and were renewed from time to time down to the 18th July, 1899, when £100 was paid off. From that time they were renewed from time to time till the 29th January, 1903, when they all became due and no further payment was made on foot of any of them. When the notes became due, they were debited in Mr. Quill's current account; when they were renewed, they were immediately discounted and credited to his account.

The first question is, whether the bank's mortgage has been

discharged by the application of the rule in *Clayton's Case* (1) and the principles laid down in *Hopkinson* v. *Rolt* (2).

The principle of *Clayton's Case* (1), as laid down by Lord Selborne in *In re Sherry* (3), is that " where a creditor having a right to appropriate moneys paid to him generally and not specifically appropriated by the person paying them, carries them into a particular account kept in his books, he prima facie appropriates them to that account, and the effect of that is that the payments are *de facto* appropriated according to the priority in order of the entries on the one side and on the other of that account."

The principle laid down in *Hopkinson* v. *Rolt* (2) is that advances made by the first mortgagee after notice of a second mortgage are not charged upon the property in priority to the subsequent mortgage.

No reason can be suggested why this latter principle should not apply to this case; and therefore we must take it that all advances made after the date of notice of Ford's mortgage, that is the 17th March, 1897, are not charged on this property in priority to Ford. Does the rule in *Clayton's Case* (1) apply? The rule in *Clayton's Case* (1) is a rule of evidence. It amounts to this, that in the absence of any other evidence of intention the parties must be presumed to have intended that the earliest payments in should be applied in discharge of the earliest items on the debit side.

This presumption can be rebutted by proof of an express contract, or by proof of circumstances that warrant the inference of a different intention.

In this account we find the credit items partly to consist of the discounted notes, and partly of cash payments. I have been informed that in three cases in this country it has been expressly decided that the principles of *Clayton's Case* (1) do not apply to a case where the credits consist wholly of bills that were never met. Unfortunately none of these cases have been reported. But if there had been no such cases, I should have held that the rule cannot apply, so far as the notes are concerned. It only

(1) 1 Mer. 572.
(2) 9 H. L. C. 514.
(3) 25 Ch. D. 692.

Ross, J. 1914. *In re* CHUTE'S ESTATE.

applies to actual payments. A bill is not a payment: it is only a conditional payment; and if the bill is not met, there is no payment at all.

On the 17th March, 1897, Mr. Quill's account stood thus—

Indebtedness on foot of promissory notes,	£2500	0	0
Cash credit, ...	536	1	9
Balance of total liability,	£1963	18	3.

As the bank's security extended to the current notes, this was the amount secured by the bank's mortgage on the 17th March, 1897. The bank by any subsequent dealings with the mortgagor could not increase the amount secured, or alter their position in any material way to the detriment of a second mortgagee.

The notes were renewed from time to time. The notes current on the 17th March, 1897, and secured by the mortgage, still remained charged on the lands.

On receipt of the notice of Ford's mortgage, the bank ought to have struck a balance, and opened a new account. This they did not do, but kept the old account going in the same way as before. How has this mortgage debt been affected by what has subsequently occurred? The renewal of the notes could not affect it at all.

Mr. Quill paid a sum of over £4000 into the bank in cash, and that is a very different matter. If this £4000 is to be appropriated according to the rule in *Clayton's Case* (1), the bank's charge is no longer subsisting as against Ford.

It is contended that the fact of the renewal of the notes in the account indicates an intention that appropriation according to the rule in *Clayton's Case* (1) should not take place. I fail to see how this can materially affect the question. How are we justified in drawing any such inference in respect of the appropriation of the cash paid to the credit of the account? The presumption is not rebutted. I am of opinion that the priority of the entire charge of the bank is gone, and that the Ford mortgage must take priority accordingly.

(1) 1 Mer. 572.

Ross, J.
1914.
In re
CHUTE'S
ESTATE.

As my decision rests upon an inference, and as a higher tribunal may draw a different inference, I think it right to deal with another contention put forward on behalf of the representatives of Mr. Ford.

The bank had two securities, the lands and the North British Insurance Policy. Mr. Ford had only one, but his deed contained a covenant against incumbrances, and for title.

According to the ordinary principles of the doctrine of marshalling, Ford had the right to throw as much as possible of the first mortgage on the security on which his own debt was not charged.

The only answer that was given to this contention was, that Ford was aware of the first mortgage; that the whole of this doctrine rests on specific performance, according to Lord Justice Christian, in *Ker* v. *Ker* (1), and that the fact of knowledge of the prior incumbrance would defeat an action for specific performance. I do not think this answer is satisfactory. I think the doctrine rests on a much wider base than that suggested by Lord Justice Christian; and, in the second place, the operation of covenants for title is not affected by the knowledge of prior incumbrances: see Norton on Deeds, p. 563; *Page* v. *Midland Railway Company* (2). I am therefore of opinion that the bank would be bound to exhaust the net proceeds of the policy in satisfying the mortgage debt due to them at the date of Ford's notice, before they could throw any of that debt on the lands. On these contentions, I am of opinion that the case of the bank cannot be sustained.

Solicitors for the representatives of James Ford: *Maxwell Weldon & Co.*

Solicitor for the National Bank: *W. H. Dunne.*

D. M. S.

(1) I. R. 4 Eq. 15. (2) [1894] 1 Ch. 11.

Wylie, J.
1914.

IN THE MATTER OF THE ESTATE OF C. M. JONES.

Mar. 12, 19.

Mortgagor and mortgagee—Overpayment of interest by agent of mortgagor—Mistake of fact—Ignorance of proviso for reduction of interest on punctual payment—Proviso for reduction of interest on payment within twenty-one days after each of days appointed—Default in punctual payment—Effect as to subsequent interest—Statute of Limitations—Common Law Procedure (Ireland) Act, 1853 (16 & 17 *Vict. c.* 113), *s.* 20.

By an order made in a Land Judge's matter in 1888 the receiver was directed to pay the several persons mentioned in the schedule thereto the interest on their several charges therein stated. Amongst these was a mortgage stated to bear interest at 6 per cent. payable on certain days. No mention was made of the fact that the 6 per cent. was reducible to 5 per cent. if paid within twenty-one days after each of such days respectively. The schedule to the order was in accordance with the schedule to the affidavit, upon which the order was made, of the solicitor having carriage. The receiver, being unaware that there was any provision in the mortgage for the reduction of interest, paid the interest at the rate of 6 per cent., whether within twenty-one days of each gale day or not, and, on the dismissal of the petition in 1902, continued to pay interest in the same way as agent for the mortgagor. It appeared that the mortgagee was also unaware of the proviso in the mortgage for the reduction of interest. The lands subject to the mortgage were subsequently sold under the Land Purchase Acts, and in 1912 the order attaching claims to the purchase-money was made. It was only on the vouching of the mortgagee's claim that it was first discovered that interest was reducible on punctual payment. On a question arising as to the rights of the parties:

Held, that each overpayment of interest was a voluntary payment made by the mortgagor to the mortgagee under a mistake of fact, and without consideration; that, upon its receipt by the mortgagee, the latter became indebted to the mortgagor in that amount; that, following *In re Rocella's Estate* (32 I. L. T. R. 8), and *In re Carroll's Estate* ([1901] 1 I. R. 78), the benefit of the proviso for reduction of interest was not entirely lost by the first default of payment within twenty-one days; and that, on the vouching of the mortgagee's claim, the mortgagor was entitled to set off the sums so overpaid within the previous six years, but that the right to set off the sums overpaid prior to that was barred by the Statute of Limitations.

QUESTION arising on the ruling of the final schedule of incumbrances, as to the right of set-off between mortgagor and

mortgagee arising out of the over-payment of interest during a long number of years.

The facts upon which the question arose, as stated in the judgment of Wylie, J., were as follows :—

By an order of the 8th March, 1887, made in the matter of the estate of John C. Jones, owner and petitioner, Richard Stokes was appointed by the Land Judge receiver over the mortgaged lands. By an order of the 18th January, 1888, made in said matter, the receiver was directed to pay to the several persons mentioned in the schedule thereto, according to their priorities, the arrears of interest set opposite their respective names, and also future interest on the several charges stated therein. Mrs. Tatlow's mortgage was set out at No. 9, and was stated to bear interest at 6 per cent., payable on the 1st January and 1st July. No mention was made of the fact that the mortgage contained the following proviso: "Provided always . . . that if the said John Copeland Jones shall within twenty-one days after each of the half-yearly days on which the interest is hereinbefore made payable under this security, pay to the said John Tissington Tatlow interest upon the principal sum or sums for the time being due upon the security of these presents at the rate of £5 per cent. per annum, then the said J. T. Tatlow shall accept interest thereon at such rate of £5 per cent. per annum in lieu and satisfaction of £6 per cent. per annum," though, in the case of the first three mortgages set out in the same schedule, the fact that there was a proviso of the kind was stated. The schedule to this order was in accordance with the schedule to the affidavit, upon which the order was made, of Mr. E. H. Tatlow, the solicitor having carriage. The receiver, accordingly, being unaware that there was any provision in the Tatlow mortgage reducing the interest to 5 per cent. on punctual payment, always paid interest thereon at 6 per cent. whether he paid such interest within twenty-one days or not, and after he ceased to be receiver, on the dismissal of the petition in 1902, he continued to pay interest in the same way as agent for the vendor. Mrs. Tatlow, in her affidavit, stated that she was entirely unaware that the mortgage contained a proviso for the reduction of interest. The lands

Wylie, J. 1914. *In re* JONES'S ESTATE.

comprised in the mortgage were subsequently sold in this matter under the Land Purchase Acts, and in 1912 the order attaching claims to the purchase-money was made. It was only in that year, when the vendor's solicitor obtained the mortgage deed for the purpose of vouching the claim thereon in this matter, that it was first discovered that the interest was reducible on punctual payment. It appeared from the affidavit of Mr. Stokes that on thirteen occasions prior to 1912, interest at 6 per cent. was paid within twenty-one days after the gale day. The difference between the rate of interest at 5 and 6 per cent. was £4 14*s.* 9*d.* The vendor, accordingly, claimed that, on taking the account of what was now due on the mortgage, credit should be given for these thirteen over-payments, amounting in all to £61 11*s.* 9*d*, as being payments on foot of principal.

W. M. Jellett, K.C., for the vendor :—

In the case of each payment of interest made within twenty-one days after the interest became due, the excess of interest paid ought to be considered as having been applied *pro tanto* in reduction of principal, as in *In re Carroll's Estate* (1), otherwise the mortgagee will be paid twice over. It cannot be contended that the benefit of the covenant to accept interest at the lower rate was lost to the mortgagor owing to default in payment within twenty-one days on one or more occasions: *In re Rocella's Estate* (2); *In re Carroll's Estate* (1). The words of the covenant here are less strong in favour of that view than in either of those cases. The mistake arose owing to the statement in the schedule attached to the order fixing priorities that interest on the mortgage was payable at 6 per cent., without adding the words "reducible to 5 per cent. if paid within twenty-one days." This was owing to the similar error in the affidavit sworn by the solicitor having carriage on which the order was based. The fact that the mortgage contained the covenant in question was never before the Court, and Mr. Stokes, both while acting as receiver under the Court, and as agent for the vendor after

(1) [1901] 1 I. R. 78. (2) 32 I. L. T. R. 8.

obtaining his discharge as receiver, naturally acted on the statement that interest was payable at 6 per cent. That was a mistake of fact: viz. of the existence of such a covenant, and ought to be relieved against.

Chadwick, for the mortgagee:—

The benefit of the covenant to accept interest at the lower rate was lost when default was once made. The words here provide for punctual payment "within twenty-one days after each of the half-yearly days." Where the covenant is in this form one omission to pay the interest within the twenty-one days puts a stop to the right of deduction: see Key and Elphinstone's Precedents in Conveyancing, 9th ed., vol. ii, p. 23, note (*c*). Assuming that the payments punctually made were in excess, no portion thereof is now recoverable. If they were made pursuant to the order fixing priorities, the matter cannot be re-opened now. That was an order never appealed against and always acquiesced in. The receiver passed his accounts and obtained his discharge in 1902, receiving credit for the payments at 6 per cent. made by him. The Court of the Land Commission cannot go behind these orders of the Land Judge's Court.

Assuming the interest punctually paid to have been excessive, the excess was paid under a mistake as to the mortgagor's legal obligation. That is a mistake of law, not of fact. It was not brought about by any fraud or misrepresentation on the part of the mortgagee. The affidavit of Mr. E. H. Tatlow, on which the order fixing priorities was based, was sworn by him as solicitor having carriage, not as solicitor for the then owner of this mortgage, who was separately represented. The mortgagee was herself ignorant of the covenant in question. The mistake, being one of law, cannot be relieved against, especially when the receiver had the means of information as to the true rate of interest in his possession. He had only to look at the deed: see *Bibbie* v. *Lumley* (1); *Currie* v. *Goold* (2).

In any case all the payments, save the last four, are barred by the Statute of Limitations. Each excessive payment could have been recovered as money received for the use of the mortgagor,

(1) 2 East. 469. (2) 2 Madd. 163.

Wylie, J. 1914. *In re* Jones's Estate.

and was irrecoverable after six years from the date of payment. The effect of the statute cannot be got rid of by the suggestion that payments made and received on foot of interest were really made in reduction of principal. A mortgagee cannot be compelled to receive his principal by instalments in such fashion. *In re Carroll's Estate* (1) is clearly distinguishable. There the mortgagee obtained, *ex parte* and until further order, an order which had the effect of making him a mortgagee in possession. He was clearly accountable for anything he received in excess of the due amount of interest.

Jellett, K.C., in reply :—

The entire mortgage account is now open, and the Statute of Limitations has no application.

Cur. adv. vult.

Mar. 19.

Wylie, J. :—

In this case Mrs. Tatlow claims, on the final schedule, a balance due for principal on foot of a mortgage of the 16th January, 1883. The vendor claims a right to deduct from the said principal money a sum of £61 11*s.* 9*d.*, being the aggregate amount of thirteen over-payments of interest made at different times extending over a period of sixteen years. The over-payments are accounted for in this way. [His Lordship stated the facts above set out, and continued.]

Counsel for the mortgagee opposes the vendor's claim, first, on the ground that, according to the true construction of the proviso for reduction of interest, the benefit of the proviso was entirely lost after the first default in payment within twenty-one days. I do not agree in this view, and even if I had any doubt, the case is more than covered by the decisions of Ross, J., in *In re Rocella's Estate* (2) and *In re Carroll's Estate* (1).

The second contention of the mortgagee is that these over-payments were made under a mistake of law, and, therefore, cannot be recovered back. In my opinion they were paid under a mistake of fact, not of law. Mrs. Tatlow, in her affidavit, says she

(1) [1901] 1 I. R. 78. (2) 32 I. L. T. R. 8.

was entirely unaware of the fact that the mortgage contained such a proviso, and Mr. Stokes, who made the payments, says the same thing. But, even if it were regarded as a mistake of law, I think the case of *Daniell* v. *Sinclair* (1) shows that, in such a case as this, the fact that the common mistake was one of law would make no difference.

The mortgagee thirdly contends that these over-payments of £4 14*s.* 9*d.*, which were in fact both paid and received on account of interest, cannot now be considered as paid in discharge of so much principal, and this contention I think is right. A mortgagee cannot be compelled to receive his mortgage debt in driblets, and it would be most inequitable and contrary to the intention of both parties that these small sums paid from time to time as interest should now be deemed to have been paid in part discharge of the principal debt. On this point counsel for vendor relied upon the decision of Ross, J., in *In re Carroll's Estate* (2), but I do not think that decision can apply to this case. In that case the petitioners were the first incumbrancers. All the lands were sold through the Land Commission, and a guarantee deposit of £360 Guaranteed Land Stock had been retained. The rest of the purchase-money discharged the entire of the petitioners' claim under the mortgage, except a sum of £70. In order to get payment of this £70, and interest thereon, the petitioners themselves applied for and obtained an order declaring them entitled, until further order, to be paid the entire dividends on the guarantee deposit. The half-yearly dividends were more than sufficient to pay the half-yearly interest on the £70, and the mortgagees were, under the circumstances, held bound to apply the excess in discharge of so much of the principal. But, in my opinion, that decision can have no application to the facts of the present case.

What, then, are the rights of the parties as to these over-payments? I think they are fairly clear. Each over-payment of £4 14*s.* 9*d.* was a voluntary payment made by the vendor to the mortgagee under a mistake of fact, and without consideration, and upon its receipt by the mortgagee the latter became indebted to the vendor in that amount. There was nothing in the nature

(1) 6 App. Cas. 181. (2) [1901] 1 I. R. 78.

Wylie, J. 1914.

In re Jones's Estate.

of a trust connected with such payments, and the money overpaid could, therefore, only be recovered back within six years: see *In re Robinson* (1).

It seems to me therefore that, on taking the account now of what is due to the mortgagee, the only right the vendor has in respect of these over-payments is a right of set-off, and as you cannot set off a statute-barred debt, the only sums which the vendor is now entitled to set off are the four sums paid within six years, amounting to £18 19*s.*, less income tax.

Solicitors for the vendor: *Carruthers & Gamble.*
Solicitors for the mortgagee: *A. & L. Goodbody.*

J. E. W.

M. R. 1914.

Jan. 27. April 7.

In re LAVELLE.

CONCANNON *v.* ATTORNEY-GENERAL and Others.

Will—Construction—Charitable bequest—Bequest for the education of the testator's relations.

A testator bequeathed to St. Jarlath's College, Tuam, the sum of £600, the interest on which was to go for ever towards the education of his relations in that college, preference to be given to the most eligible and best conducted, the selection to be given to the Archbishop for the time being, to a conscientious layman, and to the parish priest of the boy to be considered. There were no trustees of St. Jarlath's College, nor any deed of foundation. The affairs of the College were managed by a council.

Held, that the bequest was a valid charitable bequest. *Attorney-General* v. *Sidney Sussex College* (L. R. 4 Ch. App. 722) followed.

An order was made that the amount of the bequest should be paid to the Commissioners of Charitable Donations and Bequests, subject to their consenting to accept it; that the Commissioners should pay the income to the treasurer or other proper officer of the college, and that it should be the duty of the college authorities at all times to have and educate in the college one relative of the testator, to be selected by the Roman Catholic Archbishop of Tuam for the time being, and by a conscientious layman to be appointed for the purpose by the college authorities; the selection of the boy claiming to be admitted to the college to be subject to the approval of the parish priest of the parish in which the boy resided.

(1) [1911] 1 Ch. 502.

SUMMONS.

M. R.
1914.

CONCANNON
v.
ATTY.-GEN.

By his will, dated the 15th August, 1908, the Rev. Mathias Lavelle made (*inter alia*) the following bequest:—"I leave and bequeath to St. Jarlath's College, Tuam, £600, the interest on which will go for ever towards the education of my relations in that college. Bearing in mind that priority in the choice of them is always to be given to the most eligible, suitable, and best conducted. The selection to be left to the Archbishop for the time being, to a conscientious layman, and to the parish priest of the boy to be considered. The three to act as trustees to this charitable fund, and when from any cause one or more may drop off, to appoint others to act as trustees." The testator further provided that the Burse in St. Jarlath's College was to be called the Lavelle Burse.

It appeared from the affidavit filed in support of the summons that there were no trustees in whom the property of St. Jarlath's College was vested, nor any deed of foundation of the college. The college was founded by public subscription in about 1817. The general management of the college was under the control of a council. It did not appear in whom the college was vested, or in whose names its funds stood.

The present summons was taken out by the executor, for the determination of the questions—1. Whether the legacy of £600, left by the will of the testator to St. Jarlath's College, Tuam, was a valid charitable bequest; and 2. If the bequest was valid, to whom the same should be paid, and whether the trusts of the same could be carried into effect without the settlement of a scheme, and if not to have the matter referred to chambers for the settlement of a scheme.

Fetherstonhaugh, K.C., for the plaintiff.

Hynes, K.C., for St. Jarlath's College, referred to: *Attorney-General* v. *Sidney Sussex College* (1); Jarman on Wills, 6th ed., p. 217; Lord Halsbury's Laws of England, vol. iv, p. 110,

(1) L. R. 4 Ch. 722.

M. R. 1914.

CONCANNON v. ATTY.-GEN.

par. 174; Tudor on Charities, 4th ed., p. 50; *In re The Templemoyle Agricultural School* (1).

Rearden, for the Attorney-General :—

It has never been argued that a gift for the benefit of a class is not charitable: Tudor on Charities (4th ed.), p. 51; *Braund* v. *Earl of Devon* (2). The testator himself refers to the bequest as "this Charitable Fund." [He also referred to *Spencer* v. *All Souls College* (3).]

Devitt, for Michael Lavelle, one of the residuary legatees and next-of-kin of the testator :—

In *Attorney-General* v. *Sidney Sussex College* (4) it was assumed that the bequest was a valid charitable bequest. That case was decided in 1869, and the testator's will was dated the 1st May, 1641. The rule against perpetuities is waived in favour of charities, because by them the whole community is benefited. Here what the testator had in his mind was the benefit of his relations; his primary object was not to benefit the college.

Cur. adv. vult.

April 7.

O'CONNOR, M.R. :—

In this case a question arises under the will of the Rev. Mathias Lavelle, who was parish priest of Kilcooly and Kilbannon, county Galway. The will is dated the 15th August, 1908, and was proved by Mr. Henry Concannon, the surviving executor named in the will. Among other bequests the testator made the following :—"I leave and bequeath to St. Jarlath's College, Tuam, the sum of £600, the interest on which will go for ever towards the education of my relations in that college. Bearing in mind that priority in the choice of them is always to be given to the most eligible, suitable, and best conducted. The selection to be left to the Archbishop for the time being, to a conscientious layman, and to the parish priest of the boy to be considered."

(1) I. R. 4 Eq. 295.
(2) L. R. 3 Ch. 800.
(3) Wilmot, 163.
(4) L. R. 4 Ch. 722.

Subsequently in his will he referred to the bequest as "the burse in St. Jarlath's College," and directed it to be called the "Lavelle Burse."

The first question to be decided is whether the legacy is a valid charitable legacy. In my opinion it is. Gifts for the advancement of education are undoubtedly charitable, and it has been decided that bequests for the education of the donor's descendants and kinsmen are charitable: *Spencer* v. *All Souls College* (1); *Attorney-General* v. *Sidney Sussex College* (2).

So much for the validity of the bequest.

The next question which arises is to whom payment should be made. The monetary affairs of the college are not managed with any regularity. The general management of the college is under the control of a council, the members of which are defendants in this matter. It does not appear in whom the college building, with its lands, is vested, or in whose names the college funds stand. It is stated that in the year 1903 it was resolved by the council of the college that its moneys should be invested in the names of three trustees, but this resolution appears to have been wholly ignored, with the result that there is no official of the college capable of giving a legal discharge for the legacy. I will therefore direct the personal representative to pay the amount to the Commissioners of Charitable Donations and Bequests, subject to their consenting to accept it. Let me express a hope that steps will at once be taken by the council of the college to put their financial affairs on a satisfactory basis. If the existing state is allowed to continue, it must certainly lead to difficulties, if not to loss.

When the amount of the legacy is paid over to the Commissioners of Charitable Donations and Bequests, it will be their duty to invest it, and they are entitled to know, as they will certainly inquire, what exactly is the trust which they will have to perform. This brings me to the next question which has been put by the summons, viz., whether the trusts can be carried into effect without the settlement of a scheme. It also asks that if a scheme be necessary there shall be a reference to chambers to

(1) Wilmot, 163. (2) L. R. 4 Ch. 722.

M. R. 1914.

CONCANNON v. ATTY.-GEN.

settle a scheme. This necessitates an accurate definition of the trust created by the will. The interest is to go for ever towards the education of the testator's relatives in the college. So long as there are relatives willing to take advantage of the provision in the will and eligible for admission to the college, there ought to be no difficulty in the administration of the trust, but it is possible that during intervals there may not be relatives willing to take, or capable of taking, advantage of the trust. During such intervals what is to become of the interest? Is it to be accumulated, or is the college to have the advantage of the income? A similar question arose in *Attorney-General* v. *Sidney Sussex College* (1), already referred to. There the testator devised certain property to Sidney Sussex College, Cambridge, and Trinity College, Oxford, equally between them, for the only use, education in piety and learning, of certain descendants of members of his family, or, in default of such, their next poor kindred. The principal question in that case was whether a person, claiming the benefit of the gift, should become a member of either college and be educated there. It was decided that he should, but Lord Hatherley in his judgment says at p. 732:—"Moreover, Sidney Sussex College, in 1646 . . . made a resolution, and observed it down to the very latest period, that when any descendant did not come to the college, the funds should go into the general funds of the college, which are not employed for the benefit or behalf of the college itself in any other sense than that they could go for exhibitions and for the purpose of instructing those who needed instruction. That having been laid down as their rule, Trinity College did, as well as Sidney Sussex College, act upon the same system. At Sidney Sussex College this was laid down as the definite rule, the college always accepting, as I understand it, any who chose to present themselves and claim the benefit down to 1853, but not searching through England to find where others might be. I think, therefore, that I have arrived at what was the intention and understanding of all parties, both of him who gave, and of those who have accepted the benefit." In other words, the colleges were entitled

(1) L. R. 4 Ch. 722.

to appropriate the income for general collegiate purposes, subject to the obligation of giving education to claimants who were entitled, if any such presented themselves. So, too, I think that St. Jarlath's College is entitled to receive the income of the fund without interruption, even if there should be no claimant for the benefit of the trust in favour of the testator's relatives. I think that this view is in accordance with the testator's intention, because, when a scholarship, exhibition, or burse as it is called in the present case, is founded in connection with a college, that is for the benefit of the college as well as the persons qualified to compete for the prize. The only duty of the Commissioners of Charitable Donations and Bequests will be to pay over the income of the fund as it accrues due to the college authority, and it will be the duty of the college to have in the school, and educate, one relative of the testator, whenever such person is forthcoming and reasonably eligible for the school.

There is one direction in the will which requires clearing up. The selection of the claimant is given to the Archbishop, a conscientious layman, and the parish priest of the boy to be considered. This must mean that the selection is to be with the Archbishop and a conscientious layman, with the approval of the parish priest of the boy selected. Then comes the question, who is to find the conscientious layman? I can find no better solution for this problem than to say that a layman should be appointed from time to time by the council of the college who have its management.

I see no necessity for referring the case to chambers for the settlement of a scheme. The necessary directions for the administration of the charity may be embodied in the order which I shall make.

I shall declare that the Commissioners shall pay the income of the investments representing the legacy to the treasurer or other proper officer of the college as it accrues due, and that it shall be the duty of the college authorities at all times to have and educate in the college one relative of the testator, who shall be eligible and suitable for admission, such relative to be selected by the Roman Catholic Archbishop of Tuam, for the time being, and by a conscientious layman, who shall be appointed for the

M. R.
1914.

CONCANNON
v.
ATTY.-GEN.

purpose by the college authorities ; the selection of the boy claiming to be admitted to the college to be subject to the approval of the parish priest of the parish in which the boy has resided.

Solicitors for the plaintiff : *Conway & Quinn.*
Solicitors for St. Jarlath's College, Tuam : *W. Carey & Sons.*
Solicitor for the Attorney-General : *George Collins.*
Solicitor for Michael Lavelle : *F. B. M'Donogh.*

A. H. W.

MARRON *v.* COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

(1913. No. 199.)

M. R. 1913. July 24, 25, 30.

Appeal. 1914. Jan. 20, 21, 22.

Local Government—Labourers (Ireland) Acts—Improvement scheme—Application for letting of cottage—Right of preference—Labourers (Ireland) Act, 1906 (6 *Edw.* 7, *c.* 7), *s.* 29.

A district council had acquired land under an improvement scheme, made under the Labourers (Ireland) Acts and founded on "representations" made by certain agricultural labourers, of whom the plaintiff was one. When eight cottages, out of a large number comprised in the scheme, had been built, the council allotted one of them to a labourer who had not signed any of the "representations" on which the scheme was founded, but whose needs for a cottage were pressing. Prior to the erection of the remaining cottages under the scheme, the plaintiff brought an action against the council to establish his alleged preferential right to a cottage under sub-s. 2 of sect. 29 of the Labourers (Ireland) Act, 1906, and claiming an injunction and damages.

Held, by the Court of Appeal (reversing the decision of the Master of the Rolls, who had decided in favour of the preferential right of the plaintiff and had awarded him £30 damages), that the council was entitled, in the *bona fide* exercise of its discretion, to allot a cottage to the labourer whose needs were more urgent than the plaintiff's, notwithstanding that the latter had signed a representation while the successful claimant had not, and that the action should be dismissed.

TRIAL OF ACTION.

This action was brought by John Marron for (1) a declaration that he was entitled to a preference as tenant upon the first letting by the defendants of a certain labourer's plot, and cottage erected by the defendants, pursuant to the Labourers (Ireland) Acts, 1883 to 1906, on the said plot, being plot No. 52, O.S., included in the Cootehill (No. 2) Rural District Labourers (Unopposed) Order, 1908, and to be put into possession of the said plot and cottage as tenant to the defendants; (2) an injunction to restrain the defendants from letting, continuing to let, or attempting to let, the said plot and cottage to any

M. R. 1913.

MARRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

person other than the plaintiff, or otherwise attempting to defeat the right of the plaintiff to the said preference; (3) an injunction to compel the defendants to make a letting of the said premises to the plaintiff; and for this purpose to do all necessary acts for obtaining vacant possession thereof and for determining all (if any) lettings or attempted lettings thereof; and (4) damages.

The material facts of the case are stated in the judgment of the Master of the Rolls.

Serjeant Sullivan, K.C., and *D. J. O'Brien*, for the plaintiff.

Jellett, K.C., Gerald FitzGibbon, K.C., and *E. S. Murphy*, for the defendants.

The following authorities were referred to:—*R.* (*Ryan*) v. *Recorder of Cork* (1); *R.* (*Ferguson*) v. *Lurgan District Council* (2); *Tevlin* v. *Lisnaskea Rural District Council* (3); *Condon* v. *Mitchelstown Rural District Council* (4).

July 30.

O'CONNOR, M.R.:—

This action was brought by the plaintiff for the purpose of establishing a preferential right to be put into possession of a labourer's cottage erected by the defendants, the Cootehill (No. 2) rural district council, under the Labourers (Ireland) Acts.

The material facts are as follows:—In the year 1906 representations were made to the defendants by, or on behalf of, certain agricultural labourers in the Cootehill (No. 2) rural district, that there was not a sufficient number of houses available for the accommodation of agricultural labourers in the Anny district electoral division included in the rural district, and that it was the duty of the district council to take proceedings under the Labourers Acts for the making of an improvement scheme in respect of such electoral division. These representations included suggestions

(1) [1913] 2 I. R. 241.
(2) 47 I. L. T. R. 31.
(3) Unreported. Since reported [1914] 2 I. R. 15.
(4) Unreported. Since reported [1914] 1 I. R. 113, 118.

that a certain number of cottages should be built on certain specified holdings, and for agricultural labourers who were specially named. The plaintiff was one of these labourers, and the cottage designated for him was to be in the townland of Aughnamullen, in the occupation of James Casey. As a result of these representations an improvement scheme was made by the district council, and the scheme included the cottage designated for the plaintiff. The scheme was afterwards confirmed by an order of the Local Government Board, dated the 26th February, 1908, and has been partially carried out, that is, some of the cottages provided for have been erected and completed, while others have not yet been erected. Among the cottages which have been completed is that which was designated for the plaintiff, and as soon as it was ready for habitation he made application to the district council to be formally put into possession of what he regarded as his cottage. His application, however, was refused, and the cottage was given to one John Kennedy. This man, who is also an agricultural labourer, is not one of those by whom or on whose behalf the representations were made which led to the improvement scheme. He was, in fact, a stranger to it, and may so far as the scheme is concerned be described as a complete outsider.

This being so, it will be unnecessary for me to consider whether an agricultural labourer on whose behalf a representation was made for a particular cottage is entitled to a preferential right to that particular cottage as against all the others by whom or on whose behalf representations were made for cottages in the scheme, and whether his right may not be satisfied by allotting him *a* cottage. The question here is between the plaintiff and a stranger to the scheme, and I will confine my opinion to it, leaving the other question I have mentioned to be decided when it necessarily arises.

The plaintiff's case is, that the letting of the cottage was a violation of his preferential right under sect. 29 of the Labourers Act, 1906. That section is as follows:—

"29.—(1) The district council shall make regulations with respect to the letting of cottages and allotments under the

M. R. 1913.

MARRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

Labourers Acts, and for preventing any undue preference in the letting thereof, and generally for carrying the provisions of the said Acts into effect.

"(2) Regulations under this section shall provide that, on the first letting of any cottages or allotments comprised in a scheme, preference shall be given to agricultural labourers who have signed on their own behalf the representation on which the scheme was founded, or on whose behalf that representation was made.

"(3) Regulations under this section shall contain a schedule of rents to be reserved in lettings, and those rents shall be so fixed as to secure a reasonable return, having regard to the circumstances of the locality affected, or the expenditure of the council under the Labourers Acts.

"(4) Regulations under this section shall not be of any force until confirmed by the Local Government Board, in like manner and subject to the like provisions as in the case of by-laws under the Public Health (Ireland) Act, 1878."

Now, undoubtedly, the meaning of this section is, that on the first letting of cottages erected under a scheme, labourers who have made representations, or on whose behalf representations were made, should get a preference over labourers by whom or on whose behalf no representation was made; and I cannot paraphrase this better than by saying that before any outsider is admitted into a cottage comprised in a scheme, a cottage must be allotted to every available labourer by whom or on whose behalf a representation was made, and who wants a cottage.

In this case the plaintiff demanded a cottage which was available. He was refused it; and Kennedy, a stranger to the scheme, got it. I cannot describe this transaction more clearly or more accurately than by saying that Kennedy was preferred to the plaintiff. The defendants say that the plaintiff's right of preference has not been violated, because there are some more cottages to be built under the scheme, and he will get one of these in the course of time. The fact, however, remains that Kennedy was preferred to the plaintiff. The latter was postponed

and the former was preferred. The preference conferred by the statute was not given.

The defendants seek to justify their conduct on other grounds. The selection of a tenant for the cottage came before the council on the 2nd August, 1912, and this resolution was passed :—"Aughnamullen Cottage—Mr. Wellwood, C.E., certifies that this cottage may now be let to the tenant. Proposed by Mr. A. Healy, seconded by Mr. R. Harrison, that Joseph Kennedy, of Corfad, be given the labourer's cottage in the townland of Aughnamullen, in so far as he is a married man with a wife and family and a *bona fide* labourer in the Union of Cootehill, the other applicant being a single man, and not residing in the Union."

Here there are two grounds alleged for what I call preferring Kennedy to the plaintiff—(1) the plaintiff is a single man, and Kennedy is a married man with a wife and family; (2) the plaintiff is not residing in the Union, while Kennedy is.

As to (1). A married man with a wife and family may be a more deserving member of the community than a single man. He may require a cottage more urgently. But I can find nothing in the code of the Labourers Acts giving any preferential right to married men over bachelors. As to (2). If plaintiff was not residing in the Union at the time that the cottage was completed, that may have been owing to the fact that there was not sufficient cottage accommodation in the district, the very want which was to be supplied by the Labourers Acts. He was, however, on the very spot to demand his cottage at the proper time, and I do not think that the temporary absence of a labourer on hire could deprive him of his rights under the Act. In this connection I may refer to sect. 3 of the Act of 1891, which required that a labourer making a representation should be employed within the district. This section has been repealed by sect. 103 of the Act of 1903, and now a labourer making a representation need not be employed within the district: sect. 97 of Irish Land Act, 1903. I think that this goes to show that residence within the district at the time of allotment is not a necessary qualification, or a legal ground of preference.

So far I have dealt with the case on the assumption that the

M. R. 1913.

MARRON *v.* COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

district council, in giving preference to Kennedy, acted conscientiously in the discharge of their duty, and in accordance with the law as they understood it. I regret, however, that I am forced to the conclusion that they acted perversely, and with a desire to take an unfair advantage of what was their own default and breach of duty. The evidence is that the Local Government Board, for a considerable time before the letting of the cottage, had been pressing the district council to frame regulations under sect. 29, and that the district council had failed to do so. On the 2nd August, 1912, when the resolution I have read was about to be passed by the council, the clerk of the council called attention to the 29th section, and warned the members that they would be acting illegally if they gave the cottage to Kennedy instead of to the plaintiff. To this the chairman replied that they were not bound by section 29, because the council had not yet made regulations; and he was supported in this view by the advocates of Kennedy. Indeed, two members of the council, who were examined as witnesses for the defendants, admitted in Court that they would not have thought themselves entitled to set aside the plaintiff in favour of Kennedy if the regulations had been passed at the time. It is quite plain that they were taking advantage of the absence of regulations prescribed by the Act, which they knew would have prohibited what they desired to do.

I must hold, on the facts, that the plaintiff was entitled to a preference over Joseph Kennedy for the cottage, and that his preferential right was violated.

I have some difficulty, however, in granting the full relief sought for. The plaintiff seeks an order to put him into possession of the cottage, an injunction restraining the defendants from continuing to let the cottage to Kennedy, and a mandatory injunction to compel the defendants to let it to the plaintiff, and to take up possession from Kennedy. This is, in effect, asking the Court to decide, behind the back of Kennedy, that he is wrongly in possession of the cottage. I cannot order his dispossession without hearing him.

Under the circumstances, I can only award damages to the plaintiff for the violation of his legal right. It would be futile to direct an inquiry as to damages, and I will measure them myself at £30.

The defendants must pay the costs of the action, and in so deciding I must refer to the very great expense which has been thrown on the ratepayers by the very reprehensible conduct of some of the district councillors. If the warning, which was solemnly given to them by the clerk of the council, was heeded, all the expense of this action would have been avoided. As it is, I suppose the cost of this action would have provided for the building of another labourer's cottage, and then the claims of two rivals would have been satisfied. It is to be regretted that the members of the council, who were directly responsible for the miscarriage, were not made special defendants for the purpose of making them liable for the costs in exoneration of the unfortunate ratepayers, and I only hope that the Local Government Board auditor will have his attention drawn to the line of conduct which has resulted in so much loss.

In the foregoing judgment I have not referred to any of the decisions which were cited during the argument. So far as they touch the present case I think that they support the view I have taken. The case of *Tevlin* v. *The Lisnaskea Rural District Council* (1) has not yet been reported, but I gather from the case stated by the Lord Chief Baron that the only question which arose in that case was whether it was possible, pending a Local Government Board inquiry, to substitute the name of an agricultural labourer who had made a representation for a cottage which was not sanctioned by the district council, for another agricultural labourer who had made a representation for a cottage which had been sanctioned, and whether the substituted person had the same right of preference over an agricultural labourer who had made no representation as the original. I understand that the King's Bench Division decided that the substitute had such a preferential right. This being so, the plaintiff in the present case has *a fortiori* a preferential right.

I was also referred to the case of *Condon* v. *Mitchelstown Rural District Council* (2), and I have been supplied with a copy of the judgment of Ross, J., who tried it. The plaintiff complained that his preferential right to a cottage was infringed by the defendants,

(1) Since reported [1914] 2 I. R. 15.
(2) Since reported [1914] 1 I. R. 113, 118.

M. R. 1913.

MARRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

who gave the cottage to an agricultural labourer who had not made any representation. The action was dismissed, but the facts were unlike those in the present case. There the plaintiff was offered a cottage on the first letting, and so far he got his preference. His complaint was that he did not get the cottage on a particular plot, and it was held that his preferential right was satisfied by the offer he got. He was not deferred in the enjoyment of a cottage, save by his own refusal.

The King (*Ryan*) v. *The Recorder of Cork* (1), so far as it is at all applicable to the present case, shows that the preferential right which is given to labourers who have made representations is not to be cut down by imposing conditions not warranted by the Labourers Acts.

In *Ferguson* v. *Lurgan Rural District Council* (2) there is a further recognition of the preferential right of the labourers making a representation.

There is nothing in any of these cases at variance with my decision in the present case. So far as they go they seem to me to support my decision.

W. L.

Appeal. 1914.

Jan. 20, 21, 22.

The defendants appealed to the Court of Appeal (3).

Jellett, *K.C.*, and *FitzGibbon*, *K.C.* (with them *E. S. Murphy*), for the appellants :—

We submit that the judgment of the Master of the Rolls was based on a misapprehension as to the nature of the preferential right to a cottage given by the statute to the plaintiff, owing to his having signed a representation. He speaks of a cottage "which was designated for the plaintiff," but the plaintiff, according to the judgment of this Court in *Condon* v. *Mitchelstown Rural District Council* (4), had no preferential right to any particular cottage. That being so, his right will be satisfied by

(1) [1913] 2 I. R. 241. (2) 47 I. L. T. R. 31.
(3) Before O'BRIEN, L.C., and HOLMES and CHERRY, L.JJ.
(4) [1914] 1 I. R. 113, 118.

the allotment to him of any of the cottages comprised within the scheme, only a few of which have yet been built. The defendants are willing to give the plaintiff a cottage when one is available for him, and the action is accordingly premature. There is no evidence to support the finding that the defendants acted perversely, or that there was undue delay in making the regulations under the statute. *Condon's Case* (1) recognizes that the district councils have a discretion in the allotment of cottages, and in this case the discretion was properly exercised by allotting the cottage in question to the applicant who was most in need of it. Sub-s. 2 of sect. 29 of the Labourers (Ireland) Act, 1906, was never intended to preclude the exercise of such discretion. Its object was to prevent dishonest preference, not to vest an absolute right in any individual labourer. In any case, as the plaintiff would only have become a weekly tenant of the cottage, if allotted to him, and his tenancy could have been determined by a week's notice to quit, nominal damages only, if any, should have been awarded. If the defendants were guilty of a breach of statutory duty, it does not follow that an action for damages lies against them: *Cowley* v. *Newmarket Local Board* (2). *Rex* (*Ferguson*) v. *Lurgan Rural District Council* (3) only shows that a council can be compelled by mandamus to make and submit to the Local Government Board the necessary statutory regulations. *Tevlin* v. *Lisnaskea Rural District Council* (4) is not an authority in favour of awarding damages in this case, as there the defendants, according to Palles, C.B., "acted in defiance of the Act of Parliament, and without a shred of justification." Here the council has endeavoured to carry out the intention of the Legislature, namely, to provide housing accommodation for the most pressing cases.

Serjeant Sullivan, K.C., Carrigan, K.C. (with them *D. J. O'Brien*), for the respondent:—

It is clear that the plaintiff's rights under sect. 29 of the Act have, as held by the Master of the Rolls, been absolutely dis-

(1) [1914] 1 I. R. 113, 118.
(2) [1892] A. C. 345, at p. 352.
(3) 47 I. L. T. R. 31.
(4) [1914] 2 I. R. 15.

Appeal. 1914.

MARRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

regarded, and, once his claim has been refused in respect of a cottage erected on the plot in respect of which he signed a representation, it is clear he is, in effect, excluded from the entire scheme, as if the council perform their statutory duty as regards the cottages which have yet to be built, and allot them to labourers who have signed representations, no cottage will be available for the plaintiff. There is no evidence that the defendants can or will be able to provide him with another cottage, and the defence on the file is inconsistent with the case now made. The present case is not ruled by *Condon's Case* (1). There the plaintiff was actually offered a cottage within the scheme, and refused it. Here there is no cottage for the plaintiff. In *Tevlin's Case* (2) damages were awarded, although no regulations had been made. Here the plaintiff's claim was refused, although the statutory regulations were in force, and the plaintiff is entitled to damages in respect of that refusal. His loss is not to be measured by the value of a weekly tenancy; a council would never be permitted by the law to allot a cottage to a signatory to a representation so as to satisfy his preferential right, and then proceed to determine the letting, and put another man into occupation. It was never suggested that, prior to the Land Law (Ireland) Act, 1881, the value of a yearly tenancy was measured by the value of a year's occupation of the lands. In a case like this, moreover, when the council acted deliberately in defiance of what they knew to be their duty, and for collateral purposes, exemplary damages should be given: *Reeves* v. *Penrose* (3).

[*Rex* (*Ryan*) v. *The Recorder of Cork* (4) was also referred to.]

Jellett, K.C., in reply.

O'BRIEN, L.C.:—

I have had the advantage of reading the judgment which Lord Justice Holmes has written, in which the facts of this case, and the law applicable thereto, are so carefully set out, that it would be sufficient for me to say that I agree entirely, not only

(1) [1914] 1 I. R. 113, 118.
(2) [1914] 2 I. R. 15.
(3) 26 L. R. Ir. 141.
(4) [1913] 2 I. R. 241.

in the findings of fact which he has drawn, but also in the construction which he places on sect. 29 of the Labourers (Ireland) Act, 1906. I, however, wish to add a few words.

In *Condon's Case* (1) I referred in my judgment at some length to the position, as I regarded it, of district councils in relation to the administration of the Labourers Acts; the dominant idea of the legislation being, to my mind, not the conferring of benefits on any particular individual labourer or labourers, but on that class of the community at large, viz., labourers; and in my judgment in that case I pointed out how desirable, as it seemed to me, it was, that, save to the extent directly required by the statute, these councils should not be unduly restricted by rules which might prove in their application calculated to defeat the main object of the Act itself.

In that case this Court decided clearly that the right of each individual labourer who signed a "representation," whatever that right may be, was certainly not a right to indicate a particular cottage so as to bind the council to give it to him, or a right which would enable him to require the allotment to him of a cottage on a particular plot of ground; nor yet is it a right, in my judgment, such as is sought to be enforced in this action, to require in every case and under all circumstances and to the exclusion of urgent and deserving cases, the allotment to him of a cottage included within a particular scheme, merely because he had been signatory to a representation, one of those on which a scheme was ultimately founded.

The basis of this legislation, as I have said, is the amelioration of the conditions of living of a class whose unfortunate lack of proper housing accommodation rendered necessary exceptional legislation; and it cannot have been the intention of the Legislature that, in allotting these cottages, the councils should not have had a power of discriminating between the labourers within the district with which they are dealing, and of considering whose need was the most pressing, and allotting to those whose needs were most pressing. Were it otherwise, and if sect. 29 is to be given the effect contended for, a man whose need was not

(1) [1914] 1 I. R. 113, 118.

Appeal. 1914.

MARRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

O'Brien, L.C.

pressing (such as, in my opinion, is the plaintiff in the present case) would have to be given a preference in the allotment of cottages over a man whose needs, and those of his family, might be most pressing. In my judgment, the section ought not to be so construed. The effect of the section appears to me to be that, while it affords an indication that a labourer who has signed a "representation" is to be given some preference in the exercise of the judgment of the council over a labourer who has not signed, yet, in the exercise of that judgment, the will or the representation of the labourer cannot dominate or over-ride the discretion of the council to the exclusion of essential statutory considerations, and I consider that not only has an individual labourer who has signed a "representation," as in *Condon's Case* (1), no right to indicate a particular cottage within a scheme as one to be allotted to him, but also that on the true construction of sect. 29 itself, and apart from any question of fraud, dishonesty, or derogation of duty on their part, the councils have full power to exercise the discretion and power of discrimination entrusted to them, in a manner which might temporarily, as in the present case, exclude a man who had signed a "representation," in favour of another who had not signed, but whose need for a cottage was urgent. In other words, the section, although providing against undue preference, and also that there must be a primary regard to the labourers who have signed "representations," does not give any such dominant or over-riding right to a man who has signed as against one who has not signed, as would do away with the power of the council to allot a cottage to a man whom, in the proper exercise of their discretion, they considered to have greater claims.

In that view, the question arises whether there was here anything in the action of the council in the present instance amounting to fraud, misconduct, or derogation of duty; and for the reasons which will be stated by Lord Justice Holmes, I am of opinion that there are no grounds for suggesting anything of the kind.

I desire to guard myself against being taken as deciding

(1) [1914] 1 I. R. 113, 118.

that an action of this nature is certainly sustainable, more especially where, as in the present case, the scheme has not been carried out in its entirety, but both this and *Condon's Case* (1) were argued on the assumption that an action for injunction might lie; and, on that assumption, I hold that the plaintiff has failed.

HOLMES, L.J.:—

In February, 1907, the defendants, in pursuance of the Labourers (Ireland) Acts, 1883 to 1906, passed a resolution that a scheme for the improvement of labourers' cottages ought to be made, and accordingly they prepared such a scheme grounded upon certain representations of agricultural labourers and rate-payers, in the manner prescribed by those statutes. Amongst these representations, there was one proposing that a cottage should be built for the plaintiff on the farm of James Carey, and another proposing that a cottage should be built for a labourer named Clark on the same farm.

In the inquiry held by the inspector of the Local Government Board in December, 1907, Carey, the farmer, objected to having two cottages on his land, whereupon the inspector struck out one of them, and on the 26th February, 1908, he confirmed the scheme in so far as it related to twenty-five cottages.

There was great delay in carrying out the Provisional Order. In so far as cases of this kind within my knowledge enable me to judge, there is not only always delay, but delay is inevitable. Progress depends upon the local authority on the one hand and on the Local Government Board on the other. It can hardly be expected that the members of an unpaid body like the former will devote much of their time to the work; and a public department, with a limited staff, having imposed on it statutory duties exceedingly numerous, complicated, and difficult, must be slow in dealing with individual cases. The delay in this case was greatly increased by the difficulty in procuring builders who would undertake to complete the cottages for the sum which the defendants could not exceed. The amount, £140, suggested by the defendants for the erection of each cottage, was

(1) [1914] 1 I. R. 113, 118.

K. B. Div. 1914.

MARRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

Holmes, L.J.

cut down by the Board, and I gather from the minutes that it was necessary to raise the reduced sum on at least two occasions before the work could be proceeded with. At length, in the summer of 1912, five cottages were completed and three were in progress.

In this state of things an application was made by the plaintiff to be put into possession of one of the cottages ready for occupation; and this application came before the defendants on the 2nd August, 1912. The cottage in question is described in the judgment of the Master of the Rolls as designated for the plaintiff; but if he had been acquainted with decisions then unreported, he would not have used this description. The Provisional Order does not contain the names of any of the persons who were to be occupiers of the cottages, but it is possible that the inspector, at the inquiry in December, 1907, may have added them. In *Tevlin* v. *The Lisnaskea Rural District Council* (1), Palles, C.B., observes in his judgment that this was stated by counsel for the Local Government Board to be the usual practice. He added that it appeared to him that the body to let the plots was the district council, and that it was outside the function of the Local Government Board inspector to interfere in the selection of the persons to whom cottages should be allotted. This is in accordance with the judgment of this Court in *Condon* v. *The Mitchelstown District Council* (2), which held that whatever was the nature of the preference given by the Act of 1906, sect. 29, to agricultural labourers who had signed the representation on which the scheme was founded, or on whose behalf that representation was made, it was not a preference to be allotted any particular cottage.

When the plaintiff's application came before the defendants, there was another candidate for the cottage, Joseph Kennedy. He was, and is, an agricultural labourer, and so far back as January, 1908, there was a representation to the defendants that a cottage should be built for him. This was just before the issue of the Provisional Order in the scheme with which we are concerned, and such a cottage is not included in it; therefore he

(1) [1914] 2 I. R. 15. (2) [1914] 1 I. R. 113, 118.

had no claim to a preference under sect. 29. I see his name in one or two minutes of a later date, but they do not alter the fact that while the plaintiff was an agricultural labourer on whose behalf a representation was made, Kennedy was not. The following is the material evidence of what occurred at the meeting of the defendants when these rival claims were considered :—

Before the discussion on the subject began, the defendants' clerk warned the council that they would be acting illegally if they did not give the plot to the party who first made the representation, and his assistant read the Act for the council. The chairman replied to the clerk's objection that the regulations had not been passed. I am sure that both the clerk and the chairman were perfectly honest in the objection of the one, and in the reply of the other. The only observation I make is that if the law as understood by this Court is right, the clerk was wrong ; and that if Palles, C.B., was right in *Tevlin's Case* (1), the chairman was wrong. I am moreover of opinion that what was said by either is quite irrelevant to the issue of this action.

In the course of the discussion it appeared that the plaintiff was a bachelor, and that he was living with his master, and that Kennedy was a married man with a family. It was proved by the plaintiff in the Rolls Court that he was living in his brother's house when the representation in his favour was made, and that he was then working for a large farmer named Henry ; that he left Henry in 1909, and hired for six months with Harper, with whom he lived at a distance of three miles from the cottage. From Harper he went to Martin of Newbliss, eight miles away, and from him to a Mr. Moore, also of Newbliss, whose servant he was in August, 1912, and continued to be down to the following May. He lodged and boarded with these employers, except, perhaps, Henry, and it is to be presumed this fact was known to the members of the council.

There was strong evidence that the plaintiff had stated that if he got the cottage he would not live in it ; but this was contradicted by him, and the fact, if it were a fact, does not seem to have

(1) [1914] 1 I. R. 113, 118.

Appeal. 1914.

MARRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

Holmes, L.J.

influenced, and probably was not known to, the members present at the August meeting.

There was, however, a very important matter with which they were well acquainted. Two of their body had visited Kennedy's cottage, and found it in a deplorable state—in a sunk position, with a river in front and a race behind, flooded in winter, and having a damp, clay floor, with a ladder to the upper room. It was described by a medical witness in the Rolls Court as being in a most objectionable position between two streams, and approached by a rude bridge made of sticks and sods dangerous for small children, without any sanitary convenience, and not fit for the number of people that occupied it. With such knowledge as I have indicated, the council at the August meeting passed by six votes to four a resolution that Joseph Kennedy be given the cottage "in so far" (meaning inasmuch) "as he is a married man with a wife and family, and a bona fide labourer in the Union of Cootehill, the other applicant being a single man, and not residing in the Union." I presume the last sentence refers to the fact that the plaintiff had for a considerable period been living in Newbliss. Kennedy was then put in possession, and the present action was begun a little later.

I gather from the indorsement on the writ, and the statement of claim, that the object was to establish that the plaintiff was entitled to have allotted to him this particular cottage. In the *Mitchelstown Case* (1), to which I have referred, this Court held that the plaintiff had no such right. In that case the plaintiff at first asserted such a right, but he modified his claim by confining it to one of a row of cottages in a certain townland. This was repudiated by the local authority, who offered him a cottage in a different part of the district, and his action was dismissed.

In the present case the defendants were unable to offer the plaintiff another cottage, as there was none ready for occupation; but they plead that they are and have been willing to make a letting to him of another cottage on completion. A curious question might arise—whether in these circumstances the plaintiff, or any other person in his position, would have a cause of action

(1) [1914] 1 I. R. 113, 118.

until the scheme was completed. This did not arise in the *Mitchelstown Case* (1), as an offer of a cottage was there made, nor in *Tevlin's Case* (2), inasmuch as the allotment was there made to a person who was not within the Act of Parliament at all. This is a question of some difficulty which it may be necessary to consider hereafter; but I am of opinion that it does not arise in this appeal, which, I think, depends upon the construction of the 29th section in relation to a matter which, as far as I am aware, has never been decided.

Sub-sect. 1 of sect. 29 provides that "the district council shall make regulations with respect to the letting of cottages and allotments under the Labourers Acts, and for preventing any undue preference in the letting thereof."

Sub-sect. 2 provides:—"Regulations under this section shall provide that on the first letting of any cottage or allotment comprised in a scheme preference shall be given to the agricultural labourers who have signed on their own behalf the representation on which the scheme was founded, or on whose behalf that representation was made."

It will be observed that in the first sub-section there are the words "for preventing any undue preference." Is the preference in the following sub-section a due preference? in other words, is it an absolute preference which the council must give, or is it a preference which may be displaced if the council determine, without undue preference, that another agricultural labourer is much better suited for the cottage? If the latter be not the true construction, the action of the rural council must be purely mechanical. It will be bound to give a preference in cases in which the preference would be unjust and unreasonable. I cannot believe that the Legislature would so enact; and as the words are capable of the other construction, I adopt it without hesitation.

I admit that the decision of the council must be honest and free from prejudice; but in the pleadings, although it is alleged that the defendants acted illegally, there is no imputation of misconduct. If this were in the mind of the pleader, I cannot understand why he did not make the peccant members special

(1) [1914] 1 I. R. 113, 118. (2) [1914] 2 I. R. 15.

Appeal. 1914.

MARRON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

Holmes, L.J.

defendants, so that they might be made liable for the costs of the action instead of the ratepayers, who were not parties to any impropriety.

The Master of the Rolls took a decided view on this point. He says that he had come to the conclusion that the district council had acted perversely, and with a desire to take an unfair advantage of what was their own default or breach of duty. His ground for forming this opinion was, that although the Local Government Board had been for a considerable time pressing the defendants to frame regulations under section 29, they had failed to do so. There had no doubt been such pressure, but it occurred a considerable time before any cottages were completed; and it appears from the minutes that in April, 1911, the Local Government Board returned the draft regulations approved, with a statement that they would confirm the same when the statutory advertisement was published; and on the 1st December following I find that the defendants, at the request of the Local Government Board, forwarded to the Board duplicate copies of the regulations with the council's seal affixed, and signed by the chairman and clerk, together with a copy of the newspaper containing the notice of the council's intention to apply for confirmation of the regulations.

I am satisfied by a perusal of the minutes that the real difficulty causing the delay was the inadequacy of the sum that the defendants could apply for the purpose of carrying out the scheme; and there is nothing to indicate that the rural council or any of its members were postponing the regulations to enable them to allot this cottage to Kennedy.

What happened was, that the clerk raised a bad point of law, to which on the spur of the moment the chairman replied with a point equally bad. If any of the members present believed that had the regulations been finally settled they could not have allotted the cottage to Kennedy, they were in error.

As I construe the section, it was not only their right, but also their duty, to consider the merits of the two candidates; and if those merits were equal, or even if they only slightly preponderated in favour of Kennedy, to give the plaintiff the preference; but if the needs of Kennedy were far greater, if the allotment of

a cottage to him ought to be made at the earliest moment, and if no such immediate necessity existed in the case of Marron, they were justified in giving it to the former.

I am unable to infer from the evidence that the members who supported Kennedy were influenced by prejudice.

There were convincing grounds for holding that to have preferred the plaintiff to him would be an undue preference; and therefore, on the construction which the section in my opinion bears, I hold that the action must be dismissed.

CHERRY, L.J.:—

The plaintiff in this case claims a declaration that he is entitled to be admitted as tenant to the defendants upon the first letting by the defendants of a certain labourer's plot and cottage described in the statement of claim, on the ground that he signed, on his own behalf, the representation upon which this particular plot and cottage were included in the scheme to be carried out under the provisions of the Labourers (Ireland) Acts, 1883 to 1906.

He also claims to be put into possession of the cottage and plot, and an injunction to restrain the defendants from letting or continuing to let the cottage and plot to any person other than the plaintiff; and finally he claims damages for breach of the alleged statutory duty of the defendants to give him the preference in the first letting of the cottage over a man named Kennedy, to whom the cottage has been let, and who signed no representation in connection with this scheme.

The Master of the Rolls has refused to give him the full relief claimed, on the ground that Kennedy, to whom the cottage and plot have been actually let by the rural district council, is not a party to the action; but he has held him entitled to the declaration asked for, and has awarded him £30 damages for breach of his statutory rights.

As regards the main claim of the plaintiff to be put into possession of the cottage and plot, and an injunction to restrain the district council from letting them to anyone else, I think that, in

Appeal. 1914.

MAHON v. COOTEHILL (No. 2) RURAL DISTRICT COUNCIL.

Cherry, L.J.

addition to the grounds stated by the Master of the Rolls, it ought to be refused on the authority of our own decision in *Condon* v. *The Mitchelstown Rural District Council* (1). We decided in that case that no individual right to a particular cottage is conferred by the 29th sect. of the Labourers Act, 1906, upon a person who has signed a representation in respect of that cottage, and that, at the most, each of such signatories is entitled to get a cottage of some kind under the scheme. This is, in my opinion, a sufficient answer to the plaintiff's claim for possession and the injunction. It must be remembered that in the case of *Tevlin* v. *Lisnaskea Rural District Council* (2), upon which the plaintiff chiefly relies, there was a claim for damages only. This is the first case in which, so far as I am aware, a claim for actual possession of a cottage not let by the district council to the claimant has been made; and, in my opinion, it hopelessly fails.

As regards the alternative claim for damages, in respect of which the Master of the Rolls has awarded plaintiff £30, I think a sufficient answer to the claim is that plaintiff has given no proof of having sustained any damages whatsoever. He is an unmarried man, who works occasionally for farmers in the district, and when not so employed lives with his brother, who is a farmer. When in employment he is provided with suitable lodging, and at other times he lives free with his brother. Evidence was given at the Local Government Board inquiry that he himself stated on several occasions that he did not want the cottage at all, and that he would allow his mother and uncle to live in it if he got it. It is true that he himself denied having made these statements, but I am inclined to believe that he did make them, as they accord with all the other evidence as to his position and circumstances. The plaintiff, too, is a man of means, who would most probably scorn to live in a labourer's cottage. He is proved to have offered £100 for a farm on one occasion, and he has instituted and carried on at his own expense this action in the superior courts, which occupied three days before the Master of the Rolls, and three days here. The costs of this litigation must be very great. The plaintiff, all through it, has been represented by three counsel,

(1) [1914] 1 I. R. 113, 118. (2) [1914] 2 I. R., p. 15.

two of them leaders of the Bar, and the third an experienced junior. The Labourers Acts were never intended for persons who can afford the luxury of such expensive litigation, and, in my opinion, it would be a gross public scandal if the unfortunate ratepayers of the rural district of Cootehill were compelled to provide for the housing accommodation of persons of the plaintiff's means and position.

I agree with the other members of the Court that the judgment of the Master of the Rolls should be reversed, and this action dismissed with costs. While I base my judgment upon the grounds I have just stated, I desire to add that I entirely concur in the views which have been just expressed by Holmes, L.J., as to the true construction of the 29th section of the Labourers (Ireland) Act, 1906, and the nature and extent of the preference in the allotment of cottages, which it was the intention of the Legislature to confer upon persons who signed representations upon which an improvement scheme under the Labourers Acts was founded.

Solicitor for the plaintiff: *Blood Smyth & Co.*
Solicitor for the defendants: *Charles E. Murphy.*

R. ST. J. C.

M. R.
1914.
Feb. 18.
April 22.

In re BERESFORD'S SETTLEMENT.

IRVINE *v.* BERESFORD.

Settlement—Construction—Portions—Vesting—Younger children—"Child or children other than or besides the first or only son or any other son or sons who before his or their attaining the age of twenty-one years shall become entitled" to the first estate tail—Amounts of portions variable according to the number of younger children—Younger son becoming eldest after attaining twenty-one—Right to share in portions fund.

By a marriage settlement made in 1860 certain lands were limited to trustees for a term of 1000 years upon trust to raise portions for the children of the marriage "other than or besides the first or only son or any other son or sons who before his or their attaining the age of twenty-one years shall become entitled under or by virtue of these presents to the same premises for the first estate in tail male," if there should be one such child, the sum of £4000, if there should be two such children, the sum of £6000, and if there should be three or more such children, the sum of £8000, and subject thereto the lands were limited to the use of the husband for life with remainder to his first and other sons in tail male. There were four children of the marriage. M. W. B., the first-born son, attained twenty-one in his father's lifetime, and died without having disentailed, and thereupon E. B., the second son, joined in barring the entail and re-settling the lands, and on his father's death became entitled to the settled estates as tenant for life. Another child died under twenty-one and unmarried.

Held, that, according to the true construction of the settlement, the sum of £8000 was raisable for portions for younger children, and that E. B. was a younger son for the purpose of participating therein, and was entitled to be paid the sum of £4000 by the trustees.

Summons.

By a settlement dated the 23rd April, 1860, and executed on the marriage of George de la Poer Beresford and Mary Annabella Vernon Harcourt, certain lands in the King's County and county Cavan were conveyed to the use of the Right Rev. Marcus Gervais Beresford, Bishop of Kilmore, afterwards Archbishop of Armagh, and his assigns, during his life, and after his decease to the use of George de la Poer Beresford and his assigns

during his life, with remainder to the use of H. B. Milner and W. G. G. V. Vernon Harcourt their executors administrators and assigns for the term of 1000 years to commence from the death of the said George de la Poer Beresford upon the trusts thereinafter contained, and subject thereto to the first and other sons of George de la Poer Beresford in tail male. The portion of the settlement declaring the trusts of the term of 1000 years was as follows:—"And it is hereby declared that the said premises so hereinbefore limited to the said Henry Beilby Milner and William George Granville Venables Vernon Harcourt their executors administrators and assigns for the said term of 1000 years are so limited to them upon trust that if there shall be any child or children of the said George de la Poer Beresford and Mary Annabella Vernon Harcourt other than or besides the first or only son or any other son or sons who before his or their attaining the age of twenty-one years shall become entitled under or by virtue of these presents to the same premises for the first estate in tail male then the said Henry Beilby Milner and William George Granville Venables Vernon Harcourt or the survivor of them or the executors or administrators of such survivor their or his assigns do and shall after the decease of the said George de la Poer Beresford with and out of the rents issues and profits of the same hereditaments and premises or by demising mortgaging or selling the same or any part thereof for all or any part of the said term or by all or any of the ways and means aforesaid raise for portions for such child or children as aforesaid the sum or sums of money following, *videlicet*: in case there shall be but one such child (other than such son or sons as aforesaid) the sum of £4000 and in case there shall be two such children the sum of £6000 and in case there shall be three or more such children the sum of £8000 the said sums of £4000, £6000, and £8000, as the case may be, to be an interest or interests vested in and payable to all and every or such one or more exclusively of the other or others of the said children (other than such son or sons as aforesaid) with such provision for their respective maintenance education or advancement and at such ages and times and if more than one in such shares and proportions and charged with such annual or other sums of money and limi-

M. R. 1914.

IRVINE v. BERESFORD.

tations over for the benefit of any other or others of such children as aforesaid and in such manner as the said George de la Poer Beresford and Mary Annabella Vernon Harcourt during their joint lives by any deed or deeds with or without power of revocation and new appointment to be by them sealed and delivered in the presence of and to be attested by two or more credible witnesses shall from time to time direct and appoint. And in default of such direction or appointment and so far as any such may not extend then as the survivor of the said George de la Poer Beresford and Mary Annabella Vernon Harcourt by any deed or deeds with or without power of revocation and new appointment and executed and attested as aforesaid or by his or her last will shall from time to time direct and appoint. And in default of any such direction or appointment or so far as any such may not extend then the said sums of £4000, £6000, and £8000, as the case may be, shall be in trust for any child or all and every such of the said children (other than such son or sons as aforesaid) of the said marriage who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or be sooner married. Provided always that no child who shall take any part or share of any of the sums aforesaid under any such appointment as aforesaid shall be entitled to any portion of the said sums so unappointed without the part or share so appointed being brought into hotch-pot and accounted for accordingly, unless the said George de la Poer Beresford and the said Mary Annabella Vernon Harcourt or the survivor of them shall by such deed executed and attested as aforesaid or by his or her last will as aforesaid otherwise appoint."

There was issue of the marriage between George de la Poer Beresford and Mary Annabella Beresford four children, namely, Marcus William Beresford, born 1862, the defendant Edward Beresford, born 1863, Selina Mary Emily Beresford and Kathleen Matilda Beresford. The Archbishop of Armagh died on the 26th December, 1885, and thereupon George de la Poer Beresford became entitled to the settled estates as tenant for life. Marcus William Beresford, the eldest son of George de la Poer Beresford, died a bachelor on the 7th August, 1900, having attained the

age of thirty-eight years, but without having joined his father in disentailing the settled estates. Selina Mary Emily Beresford died a minor and unmarried, on the 10th November, 1880. By an indenture dated the 29th April, 1903, Edward Beresford, who was then tenant in tail under the limitations of the settlement of 1860, joined with his father in barring the entail, and the lands, subject to the estates preceding the estate in tail male of the said Edward Beresford other than the estate for life of the said George de la Poer Beresford, were limited to such uses as George de la Poer Beresford and Edward Beresford should jointly appoint. By another deed executed on the same day, being the settlement executed on the marriage of Edward Beresford, the estates were re-settled on George de la Poer Beresford, for life, with remainder to Edward Beresford for life, with remainder to his issue in tail male.

George de la Poer Beresford died on the 3rd August, 1906, having by his will dated the 3rd March, 1906, bequeathed to his daughter, Kathleen Matilda Beresford, the sum of £4000; and he declared that the provision thereby made for her was intended to be in lieu of and in substitution for the provision made for her by the settlement of 1860, and should be accepted by her in lieu and stead thereof, and accordingly that she should, if and when required by the person for the time being entitled to the settled estates, release the said lands from the charge for a younger child created by the settlement of 1860, and from all claims on foot thereof. Accordingly, by a deed of the 18th December, 1906, Mary Annabella Beresford released her power of appointment over the sum of £8000, or other the principal sum which in the events that had happened had become raisable for portions under the trusts of the term of 1000 years limited by the settlement of 1860, to the intent that such sum might be held on the trusts declared by the said settlement as in default of appointment; and, by the same deed, Kathleen Matilda Beresford, in consideration of the payment of the legacy of £4000, released the settled estates from the sum of £4000 or other the sum to which she might be entitled under the trusts of the said settlement.

The settled estates were sold under the Land Purchase Acts, and the purchase-moneys paid to Charles Cockburn D'Arcy Irvine

M. R. 1914.

IRVINE v. BERESFORD.

and Henry de la Poer Beresford, the plaintiffs in the present case, as trustees for the purposes of the Settled Land Acts.

This summons was taken out by the plaintiffs for the determination of the questions:—(1) Whether, having regard to the fact that there were three children, namely, the defendant Edward Beresford and two daughters, born of the marriage of George de la Poer Beresford and Mary Anabella Vernon Harcourt in addition to Marcus William Beresford, the eldest son, the sum of £8000 became raisable for portions under the trusts of the term of 1000 years; (2) Whether the trustees might, out of the capital moneys in their hands, raise and pay a principal sum of £4000, as being part of the said portions charge, to the said Edward Beresford. Edward Beresford and his eldest son, George William de la Poer Beresford, were the defendants in the summons.

Phelps, for the plaintiffs.

Longfield, for the defendant, Edward Beresford:—

I submit that in the events which have happened £8000 became raisable for portions. What the Court has to do is to ascertain what child is excluded, and then the others are entitled. Under the terms of the settlement the period of vesting is independent of the date of the death of George de la Poer Beresford, and of the period of distribution. When Edward Beresford attained age, his elder brother being then still alive, he became a possible portionist, but his portion was liable to be divested by an appointment. The amount raisable depends on the number of children coming into existence. Once the eldest son was born he got a vested estate tail; once three younger children were born the sum of £8000 became raisable for portions. The clause in the settlement providing for the amount to be raised, "in case there shall be but one such child (other than such son or sons aforesaid) the sum of £4000 and in case there shall be two such children the sum of £6000 and in case there shall be three or more such children the sum of £8000," does not contain the restrictive words, "who being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that

age or marry," which are usual in a modern settlement. The amount raisable, therefore, depends only on the number of children born. In *Hemming* v. *Griffith* (1) the provision for raising portions was as follows:—"Upon trust by sale or mortgage . . . or by any other lawful ways or means, if there shall be but one child of the said intended marriage, other than and except an eldest or only child, whether son or daughter, for the time being entitled to the hereditament for an estate of inheritance in tail male in possession, or in remainder immediately expectant upon the decease of the survivor of them the said H. D. Griffith and Hester Thomas, then to levy and raise the sum of £8000 for the portion of such child; and if there shall be two such children . . . except as aforesaid, then to levy and raise the sum of £12,000 for the portions of such children . . . and if there shall be three or more such children, except as aforesaid, then the sum of £15,000 for the portion or portions of such several children"; there followed a power of appointment to the intended husband and wife in the usual form, and the articles continued: "and in default of such direction or appointment, and subject to any such as shall be made, to become a vested interest in such child or children being a son or sons at the age of twenty-one years, or being a daughter or daughters at that age or marriage, which may first happen." The articles further provided that the trustees should have power to raise any part of the portion or portions by way of advancement of the said child or children. There were issue of the marriage four children, two of whom died under twenty-one, and Vice-Chancellor Stuart held that in the circumstances the trust to raise £15,000 had arisen in favour of the surviving younger child. In *Duncombe* v. *The Duke of Leinster* (2) the decision of Meredith, M.R., was to the same effect. See also Mathews on Portions, c. vi, p. 145.

My second proposition is that Edward Beresford is not disqualified, in the events that have happened, from being a portionist. The definition of portionists is arrived at by defining the class of excluded persons: See *Windham* v. *Graham* (3), which was followed in *In re Wise's Settlement* (4). [He also referred

(1) 2 Giffard, 403.
(2) 41 I. L. T. R. 33.
(3) 1 Russ. 331.
(4) [1913] 1 Ch. 41.

M. R. 1914.

IRVINE v. BERESFORD.

to Davidson's Conveyancing (1873), vol. iii, part 1, p. 445.] [O'CONNOR, M.R.: Is he not estopped by being a party to the re-settlement of 1903?] No, it is carried out in exercise of a power of appointment, and is made expressly subject to the estates preceding the life estate of Edward Beresford.

Pringle, for George William de la Poer Beresford:—

Edward Beresford was not a "younger son" at the material time, which is the period of distribution, or, at all events, the period at which the portions vested indefeasibly: see judgment of Eve, J., in *Re Wise's Settlement* (1). As to the period at which the character of "eldest son" is to be determined, see Davidson's Conveyancing (1873), vol. iii, pt. 1, p. 419. *Windham* v. *Graham* (2) is distinguishable, because in that case the portions had vested indefeasibly; here Edward's portion did not indefeasibly vest in him until the release by his mother of her power of appointment in 1906. See also *Chadwick* v. *Doleman* (3); *Collingwood* v. *Stanhope* (4). The settlement in this case contains no provision that the portions are to vest at twenty-one, except in default of appointment; it was the presence of such provision in the settlement in *Re Wise's Settlement* (5) that was the ground of decision there. [He also referred to Lord Halsbury's Laws of England, vol. xxv, p. 587, par. 1048; *In re Bayley's Settlement* (6); *Morton's Trusts* (7).]

Longfield, in reply, referred to *Williams* v. *Pinckney* (8).

Cur. adv. vult.

April 22.

O'CONNOR, M.R.:—

In this case a summons was issued for the purpose of determining the rights of parties under the trusts, declared by a marriage settlement, of a portions term.

This settlement bears date the 23rd April, 1860, and was executed on the marriage of George Beresford, who was the

(1) [1913] 1 Ch. at p. 47.
(2) 1 Russ. 331.
(3) 2 Vern. 528.
(4) L. R. 4 H. L. at p. 52.
(5) [1913] 1 Ch. 41.
(6) L. R. 9 Eq. 491; L. R. 6 Ch. 590.
(7) [1902] 1 I. R. at p. 310.
(8) 67 L. J. Ch. (N. S.) 34.

eldest son of the Right Rev. Marcus Gervais Beresford, then Lord Bishop of Kilmore, and subsequently Lord Bishop of Armagh and Primate of all Ireland. So far as material to the question at issue the settlement was as follows:—Certain lands were thereby conveyed to the use of the Lord Bishop for his life, with remainder to the use of George Beresford for his life, with remainder to the use of trustees for the term of 1000 years, and subject thereto to the use of the first and other sons of the said George Beresford by his intended wife in tail male severally and successively in priority of birth, and it was declared that the said term of 1000 years was limited to the trustees thereof upon trust that if there should be any child or children of the said George Beresford by his said wife other than or besides the first or only son or any other son or sons who before his or their attaining the age of twenty-one years should become entitled under the settlement to the said lands for the first estate in tail male, then the trustees should, after the decease of the said George Beresford, and of the said Lord Bishop, raise for portions for such child or children as aforesaid the sums of money following:—In case there should be but one such child (other than such son or sons as aforesaid), the sum of £4000, and in case there should be two such children the sum of £6000, and in case there should be three or more such children the sum of £8000, the said respective sums to be an interest vested in and payable to all and every such one or more exclusively of the other or others of the said children (other than such son or sons as aforesaid) in such manner as the said George Beresford and his wife should by deed appoint, and in default of such appointment as the survivor should by deed or will appoint, and in default of appointment, then the said sums were to be in trust for any child or all and every such children (other than such son or sons as aforesaid) of the said marriage who being a son or sons should attain the age of twenty-one years or being a daughter or daughters should attain that age or be sooner married.

There were issue of the marriage four children and no more, viz. Marcus (the first born), Edward (the second born), Selina, and Kathleen.

M. R. 1914.

IRVINE v. BERESFORD.

The Lord Bishop, who was first tenant for life, died on the 26th December, 1885, whereupon his son George became entitled under the settlement to an estate for life in possession in the lands.

Marcus, the first-born son, died a bachelor on the 7th August, 1900, in his father's lifetime, having attained the age of thirty-eight years, and without having disentailed the lands.

Selina died on the 10th November, 1880, a spinster, and under the age of twenty-one years.

By an indenture dated the 29th April, 1903, and made between George Beresford of the first part, his son Edward of the second part, and Anthony F. Maude and Arthur Cortlandt McGregor of the third part, and enrolled as a disentailing deed, the estate tail of Edward, to which he had become entitled next in remainder to his father's life estate by reason of the death of his elder brother without issue, was barred, and the lands were limited to such uses as the father and son should by deed jointly appoint.

By another indenture of even date, made on the occasion of Edward's marriage, George and Edward, in exercise of the power of appointment vested in them by the previous deed, appointed that the lands should after the solemnization of the intended marriage go and remain to the use of George during his life, with remainder to the use of Edward during his life, with remainder to his sons in tail, with remainders over.

George, by his will, dated the 3rd March, 1906, bequeathed to his surviving daughter Kathleen the sum of £4000, declaring that it should be in lieu of, and in substitution for, the provision made for her by the settlement of 1860, and that she should, if required so to do, execute a release of the lands from the charge for a younger child created by the settlement, and from all claims on foot thereof. George died on the 3rd August, 1906, and his will, with a codicil thereto, which did not affect the bequest, was proved on the 18th October, 1906.

By an indenture dated the 18th December, 1906, and made between Mary Annabella Beresford (the widow of George) of the first part, Kathleen (his daughter) of the second part, the said Edward Beresford and the said Mary Annabella Beresford of

the third part, and the said Edward Beresford of the fourth part, the said Mary Annabella Beresford released the power of appointment vested in her by the settlement of 1860, to the intent that she might be absolutely precluded from exercising the said power, and that the sum of £8000 or other the sum raisable under the trusts of the said term of 1000 years limited by the settlement of 1860, might be held upon the trusts thereby declared as in default of appointment, and the said Kathleen, in consideration of the payment to her of the said legacy of £4000, released the lands from the principal sum of £4000, or other the sum to which she might be entitled under the said settlement.

Edward Beresford, as the tenant for life, subsequently sold the settled lands under the Irish Land Purchase Acts, and for the purpose of the sale the plaintiffs in this matter were appointed trustees for the purposes of the Settled Land Acts of the compound settlement constituted by the settlement of 1860, the disentailing assurance of the 29th April, 1903, and the re-settlement of the same date.

The sale was completed, and the net purchase-moneys were paid to the plaintiffs, who have applied to the Court for its decision on the question whether, under the circumstances, the sum of £8000 became raisable under the trusts of the term of 1000 years limited by the settlement of 1860, and whether Edward Beresford is entitled to be paid as his share thereof the sum of £4000. These questions are to be determined by reference to the trust declared by the settlement, and the events which have happened.

The trust was that, if there should be any child or children of the marriage other than the first or only son or any other son or sons who before his or their attaining the age of twenty-one years should become entitled to the lands for the first estate in tail male, then the trustees should, after the decease of their father and grandfather, raise for their portions, in case there should be one such child £4000, in case there should be two £6000, and in case there should be three or more £8000. Pausing here for a moment, it is to be observed that there are no such terms used as "elder child" or "younger child"—ambiguous descriptions which may imply priority of birth, or

M. R. 1914.

IRVINE v. BERESFORD.

may imply that eldership which carries with it the title to the settled estate. We have, on the contrary, clear and unambiguous descriptions—"first or only son or other son or sons who before attaining twenty-one years shall become entitled to the first estate tail," and other child or children. There can be no difficulty in applying these to the events which have happened. There were four children, two sons and two daughters. The first-born, Marcus, became entitled on his birth to the first estate tail. He lived until he was thirty-eight years of age. His next brother Edward then became entitled to the next estate tail, but not until he had long previously attained twenty-one years of age. He was, therefore, a child "other than the first son or a son who before attaining twenty-one became entitled to the first estate tail," even if the description "first estate tail" is wide enough to include a second estate tail, which, by the failure of the first, becomes the estate tail next in remainder to the estate for life. There were also two daughters, making three children, in addition to the first-born son. Clearly then, under the terms of the settlement as we find it, the sum of £8000 became raisable. Being raisable, to whom was it to go? To the children, other than the excluded son, according to appointment, and, in default of appointment, to such of them as being sons should attain twenty-one or being daughters should attain that age or marry in equal shares. One daughter, Selina, died under twenty-one, a spinster. She could not, therefore, take in default of appointment. There remained, besides the first-born son, only two more, viz.: Edward and Kathleen, who attained twenty-one. On the wording of the settlement I cannot see how Edward is deprived of an equal share in the £8000 by his becoming entitled, after he had attained twenty-one years, to the next estate tail after that of his first-born brother. His claim is, no doubt, that of a member of a class; but no matter at what date the class is to be ascertained, whether at the time of distribution or at any other time, he must still be included in it, the class being the children other than the first-born son or sons who before attaining the age of twenty-one became entitled to the first estate tail.

I construe the settlement exactly as I find it expressed, without the aid of authority or rules of construction, and this I believe to

be the true way of getting at the meaning of a legal document as of all other documents. In *Leader* v. *Duffy* (1), Lord Halsbury, in referring to the application of rules of construction to the interpretation of documents, said: "Whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained.... It appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption, to bend the language in favour of the assumption so made." So, in the present case, I cannot approach the construction of the settlement of 1860 with the preconceived notion that the settlors intended that a son of the marriage, whether first-born or after-born, who should at any time become entitled to the settled land before portions raisable under a portions term became payable, was not to participate therein. This intention, if it exists, is only to be gathered from the settlement itself, and when this is clear and unambiguous there is no need for calling rules of construction in aid. It is only when words of doubtful meaning are used that these are properly referred to. For instance, if we had in the present case, instead of the precise descriptions used, viz.—first-born son or other son who should before attaining twenty-one years become entitled, and any child or children other than such—if we had instead of this—elder son and younger children—we should have ambiguous descriptions, because elder son is very often used in the sense which includes the succession to the estate, and younger child in the sense which excludes such succession, and only covers a claim to a fund charged thereon as a portion. In such a case it is allowable, in order to fix the meanings of the terms used, to have regard to the general purpose of a marriage settlement of real estate, which is to give the estate itself to one son and to provide for the others by charging portions thereon, and not to allow a son who becomes entitled to the estate to take a share of the portions as well. Such being the main purpose, the settlement may in such cases be construed so as to carry it out without doing violence to the language used.

(1) 13 App. Cas. 294.

M.R. 1914.

IRVINE v. BERESFORD.

This I understand to be the principle underlying the cases which involved the rights of elder and younger children. In *Collingwood* v. *Stanhope* (1), Lord Hatherley says at page 52:—"The principle of those cases is this, that the Court, with regard to all questions arising on provisions for children under a marriage settlement, holds that the principal intent to be imputed to the parties (however differently that intent may be expressed, *so long as it is not contrary to what is found in the settlement*) is a desire to provide equality for the children, that one child should not take a double portion, and that no child should be excluded.... That principle has led to this conclusion that, although it should be, in terms, said in the settlement that the elder child is not to have a portion, yet if under such a settlement the one who is really the elder child, the first-born, does not take the family estate, it has been held that, the family estate going to a younger son, ... the Court of Chancery does not regard the elder born as the elder son, but regards the younger brother, who is in possession of the family estate, as the elder, and the actually elder brother as the younger, in order to introduce him as a younger brother into the benefits of the portions provided for the younger children." This principle, enunciated by Lord Hatherley and to be found in many other cases, cannot, in my opinion, be applied to the present case without doing violence to the language of the settlement, which is most precise in its terms, and follows a well-understood common form of conveyancing. It is almost in identical language with that found in *In re Wrottesley's settlement, Wrottesley* v. *Fowler* (2). In that case the trust fund was settled in trust for the children of the marriage (other than an eldest or only son or other son who before attaining the age of twenty-one years should be or become the heir male or heir male apparent of the said Arthur Wrottesley) as the husband and wife should appoint—just as in the present case,—and in default of appointment for the children who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares. The question which arose in that case, as in this, was whether a younger son who had become an elder son after he had attained twenty-one years was excluded

(1) L. R. 4 H. L. 43. (2) [1911] 1 Ch. p. 708.

from the trust above mentioned. The circumstances indeed were not the same as in the present case, but Lord Parker (then Parker, J.) points out that the form of the settlement was adopted from Davidson's Precedents, and that it was framed to avoid the inconvenience arising from a portion, given to a younger son at twenty-one, being subsequently divested on his becoming an eldest son. His words are:—"It is quite clear to my mind that that form has been adopted for the sake of preventing difficulties arising because a portion vested at twenty-one might otherwise be divested. That being the case, in approaching this particular settlement, where the words are 'an eldest or only son or other son who before attaining the age of twenty-one years shall be or become the heir male or heir male apparent of the said Arthur Wrottesley,' the father, I should naturally suppose that the object of the words was to prevent any difficulty as to vesting of portions or of interests at twenty-one." In Lord Parker's opinion, this consideration alone excluded the application of the rules of construction I have referred to. In the present case Edward, on attaining twenty-one years, took a vested interest in the fund for younger children. This would have been divested on his succession to the estate were it not that the words of exclusion were confined to sons becoming entitled before attaining twenty-one years of age. He did not become entitled until long afterwards, and in my opinion he is now entitled to £4000, being one moiety of the sum of £8000, raisable in the event of there being three children (as there were) other than a first-born or only son or other son who should have become entitled to the lands for the first estate tail before attaining twenty-one years.

Solicitors for the plaintiff: *Maunsell, Darley, and Orpen.*

Solicitors for the defendant Edward Beresford: *Richardson and Synnott.*

Solicitors for the defendant George William de la Poer Beresford: *Falls and Pringle.*

A. H. W.

Barton, J.
1913.
Oct. 29.

ROYAL WARRANT HOLDERS' ASSOCIATION *v.* SULLIVAN.

Royal Arms—Unauthorized user in connection with business—Injunction—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 68.

By sect. 68 of the Trade Marks Act, 1905, if any person without the authority of His Majesty uses in connection with any business the Royal Arms in such manner as to be calculated to lead to the belief that he is duly authorized so to use them, or if any person without the authority of His Majesty, or of a member of the Royal Family, uses in connection with any business any title in such a manner as to be calculated to lead to the belief that he is employed by or supplies goods to His Majesty or such member of the Royal Family, he may, at the suit of any person who is authorized to use such arms or title, or is authorized by the Lord Chamberlain to take proceedings in that behalf, be restrained by injunction from continuing so to use the same.

The defendant had for a number of years carried on business as a victualler in Dublin, and conspicuously used on his business stationery, bill-heads, and delivery carts, and in advertisements, the Royal Arms, with the words "By appointment." The defendant had no authority to use the Royal Arms. His predecessor in the business, from whom he had purchased it, had been granted in 1839 by the then Lord Lieutenant of Ireland a warrant to use the Vice-regal Arms, and this warrant had been handed to, and was in the possession of, the defendant. He had supplied meat to the late King Edward when he visited Ireland. The defendant had used the Royal Arms in connection with his business for a number of years without interference, and had acted under the bona fide belief that he was entitled so to use them. He refused to discontinue such user, although called on so to do by the plaintiffs before action brought. The plaintiffs, who were an incorporated association authorized to use the Royal Arms, and who were specially authorized by the Lord Chamberlain to bring the present proceedings, having applied for an injunction to restrain the defendant from continuing to use the Royal Arms in such manner as to be calculated to lead to the belief that he was duly authorized to use them, and from using the title "By appointment," without the authority of His Majesty or of a member of the Royal Family in connection with his business in such manner as to be calculated to lead to the

belief that he was employed by or supplied goods to His Majesty or such member of the Royal Family:

Held, that the defendant was using the Royal Arms without the requisite authority, and that the plaintiffs were entitled to such injunction, with costs.

Barton, J.
1913.

ROYAL WARRANT HOLDERS' ASSOCIATION *v.* SULLIVAN.

MOTION.

By their statement of claim the plaintiffs stated as follows:—

1. The Royal Warrant Holders' Association is a body incorporated by Royal Charter dated 25th February in the seventh year of the reign of His late Majesty King Edward, and is representative of the holders of Royal Warrants. The said association has express authority to use the Royal Arms. It is by their said charter their duty to prevent the wrongful assumption or use of such arms by persons not duly authorized to use the same, or of any device, emblem, or title, in any manner which for the time being may not be duly authorized by law, and to prevent the representation by any person without lawful express authority that such person enjoys Royal Patronage, and to take action for the enforcement of laws relating to the above matters.

2. When the Royal Arms are used by a trader, the result is to cause it to be generally believed that such use is being made thereof by virtue of proper authority to use the same. Almost all warrant holders do make use of the Royal Arms on their premises, business stationery, bill-heads, or otherwise in pursuance of the authority conferred upon them by their warrant of appointment as the emblem of possession of such warrant, and very great value is attached by traders to the right to display the Royal Arms as aforesaid.

3. The defendant carries on business as a victualler at 59 Great Britain Street, in the City of Dublin, and he is using in connection with his business there carried on the Royal Arms, or arms so closely resembling the same as to be calculated to deceive, together with the Royal mottoes "Honi soit qui mal y pense" and "Dieu et mon droit," and such words as "By Appointment," "By

Barton, J. 1913.

ROYAL WARRANT HOLDERS' ASSOCIATION v. SULLIVAN.

Special Appointment" (1), the same being placed conspicuously on his business stationery, bill-heads, documents, and delivery vans used in connection with his said business, and also in certain advertisements published by defendant in connection with his said business, in accordance with the practice of Royal Warrant holders.

4. The defendant is not and never has been duly authorized to use the Royal Arms, and he does not supply goods to His Majesty or any member of the Royal Family, and has no right to use the said Royal Arms in manner aforesaid nor any justification for so doing.

5. The use by the defendant in manner aforesaid is calculated to lead, and must lead, to the belief that he is duly authorized to use the Royal Arms, or is employed by or supplies goods to His Majesty or a member of the Royal Family.

6. Before this action was commenced the plaintiffs on several occasions represented to the defendant that the use by him of the Royal Arms in manner aforesaid was wrongful, and requested him to give an undertaking to discontinue using the same; but the defendant declined to give any such undertaking or to discontinue such user as aforesaid of the Royal Arms.

7. The plaintiff association is not only expressly authorized as aforesaid to use the Royal Arms, but is further specially authorized by the Lord Chamberlain to take the present proceedings, which are brought in pursuance of the provisions of the Trade Marks Act, 1905.

The plaintiffs claimed as follows:—

1. An injunction to restrain the defendant from using the Royal Arms, or Arms so closely resembling the same as to be calculated to deceive, without authority, in connection with his,

(1) The evidence in the case showed clearly that the defendant had made use of the title "By appointment" in connection with his use of the Royal Arms. It was not clearly proved in evidence that the title "By Special Appointment" was used by him habitually in connection with his business.—REP.

the defendant's, trade or business in such manner as to be calculated to lead to the belief that he is duly authorized so to use the Royal Arms.

2. And from using the titles "By Special Appointment," "By Appointment," or any title to a similar effect, without the authority of His Majesty or a member of the Royal Family, in connection with his trade or business, in such manner as to be calculated to lead to the belief that he is employed by or supplies goods to His Majesty or such member of the Royal Family.

3. An order for delivery upon oath of all documents, books, articles, and things on which the said Arms or title appear in manner aforesaid and which are in the possession or power or under the control of the defendant.

4. Further and other relief.

5. Costs.

The present application was on behalf of the plaintiffs for an interlocutory injunction restraining the defendant in the terms of the claim in the statement of claim.

No defence had been filed, and by consent the hearing of the motion was treated as the trial of the action.

An affidavit was made in support of the application by Mr. James William Colman, the secretary of the plaintiff association, in which he stated that the Royal Warrant Holders' Association was a body incorporated by a Royal Charter (to which he referred), and in which the purposes of the Association were set out. It appeared that the association had express authority to use the Royal Arms, and by their charter it was their duty to prevent the wrongful assumption or use of such Arms by persons not duly authorized to use the same, or of any device, emblem, or title in any manner which for the time being might not be duly authorized by law, and to prevent the representation by any person without lawful express authority that such person enjoyed Royal patronage, and to take action for the enforcement of laws affecting the above matters. The plaintiff association (including their predecessors in title) on the death of Queen

Barton, J. 1913. ROYAL WARRANT HOLDERS' ASSOCIATION v. SULLIVAN.

Victoria became known as the "Royal Warrant Holders' Association, Limited." Between 1895 and 1900 they were known as "The Incorporated Association of Her Majesty's Warrant Holders, Limited"; and previously from 1840, when the association came into existence, were known as "The Association of Her Majesty's Tradesmen."

It appeared that it was a common practice at one time of traders to assume and use the Royal Arms without justification, and to put a stop to this sect. 106 of the Patents, Designs, and Trade Marks Act, 1883, was passed, which provided that—"Any person who, without the authority of Her Majesty, or any of the Royal Family, or of any Government Department, assumes or uses in connection with any trade, business, calling or profession, the Royal Arms, or arms so nearly resembling the same as to be calculated to deceive, in such a manner as to be calculated to lead other persons to believe that he is carrying on his trade, business, calling, or profession, by or under such authority as aforesaid, shall be liable on summary conviction to a fine not exceeding £20." Sect. 90 of the Patents and Designs Act, 1907, is now substituted for sect. 106 of the Act of 1883: see Amendment Act, 1907 (7 Edw. 7, c. 28), sect. 44. The authority for the use of the Royal Arms is usually conferred by a Royal Warrant of Appointment made by the Sovereign through certain departments of the Royal Household, the Keeper of the Privy Purse, the Lord Steward's Department, the Lord Chamberlain's Department, or the Department of the Master of the Horse.

There are about 887 warrant holders to His present Majesty, each of whom is properly authorized by the Royal Warrant he holds to use the Royal Arms in connection with his business, and about eighty-seven warrant holders to Queen Mary, about 197 warrant holders to the late King Edward VII, and also 199 warrant holders to the late Queen Victoria, and about 206 warrant holders to Queen Alexandra. Lists of warrant holders are annually published in the *London Gazette*. The defendant did not appear in the last published list of warrant holders in the *London Gazette* issue of 3rd January, 1913, nor in previous lists of warrant holders. It was admitted that the defendant carried on

business as a victualler at 59 Great Britain Street, in the City of Dublin, and conspicuously used the Royal Arms in connection with his business by displaying same on his business notepaper, bill-heads, delivery-vans, advertisements, &c.

On the 11th November, 1910, the secretary of the plaintiff association wrote to the defendant, asking him to discontinue his unauthorized and illegal user of the Royal Arms, and requesting that he should write to him giving an undertaking to do so.

The defendant declined to give such undertaking, and continued the use of the Royal Arms on his receipts and business stationery, and also the words "By Appointment," and the Royal Arms continued to be painted on the back of his delivery vans. A long correspondence followed between the secretary of the plaintiff association and their solicitors on the one hand, and the defendant and his solicitor on the other.

On the 6th March, 1912, the secretary wrote a letter to the Secretary of the Lord Lieutenant stating that the defendant was using the Royal Arms with the title "By Appointment" on his stationery, while there was no trace of his name in the list of Royal Warrant holders, and asking if defendant had recently been granted authority to do so. The Secretary of the Lord Lieutenant wrote in reply stating that no such authority had been recently granted.

On the 15th July, 1912, Mr. J. F. Culhane, as solicitor for defendant, wrote saying that his client had applied for liberty to use the Royal Arms. Further correspondence took place, and it transpired that no application from the defendant for a warrant had reached Buckingham Palace, and the solicitors for the plaintiffs wrote insisting on the defendant at once discontinuing the user of the Royal Arms without awaiting the result of any application he might make.

On the 9th April, 1913, the Lord Chamberlain duly authorized the Royal Warrant Holders' Association to take proceedings under sect. 68 of the Trades Mark Act, 1905, against the defendant to restrain him from making use of the Royal Arms in connection with his business.

By his affidavit filed to resist the motion defendant said that

Barton, J. 1913.

ROYAL WARRANT HOLDERS' ASSOCIATION v. SULLIVAN.

he held the original warrant granted to Mr. Robert O'Brien, victualler, who then carried on business at 59 Great Britain Street, on 6th May, 1839, by the then Lord Lieutenant of Ireland, Viscount Ebrington. That the said Robert O'Brien was his predecessor in title carrying on business at 59 Great Britain Street. He stated that the warrant granted by Viscount Ebrington (1) had been used from the date of the grant, *i.e.*, for more than seventy years without any intermission whatever, in connection with the victualling business on his present premises. He said that he had purchased the interest of Robert O'Brien in the premises, and that the price he paid therefor was enhanced because he held the warrant of 1839, and he referred to the original warrant which had been in his possession since it was handed over to him by Robert O'Brien. The second paragraph of defendant's affidavit was as follows :—" I further say that I personally was victualler to Earl Dudley during his term of office as Lord Lieutenant of Ireland, and when His Majesty the late King Edward VII visited this country I supplied meat to His Majesty. During the visit of his late Majesty my account with Earl Dudley exceeded £400, which was punctually paid, so that I could honestly and truthfully state that I supplied Earl Dudley during his Viceroyalty in Ireland, and I supplied his late Majesty during his visit to this country. On all the accounts I furnished to the Castle the Royal Coat of Arms appeared in the same way as in the correspondence I had with Mr. Coleman, secretary of plaintiff association, and exhibited by him in his affidavit, and no exception was ever taken to the Royal Coat of Arms being on my bill-heads." Defendant also stated that he was personally aware that several victuallers and other traders in Dublin used the Royal Coat of Arms on their bill-heads, and that, to the best of his knowledge, information, and belief, they never had a warrant from any Lord Lieutenant or King. He alleged that he was singled out from all the traders in Dublin because of the trade jealousy through one individual who claimed to have some right to hold the Royal Warrant for a few years, and he stated that he had held the original warrant

(1) The warrant granted by Viscount Ebrington authorized Robert O'Brien to use the *Viceregal* Arms.

referred to for over twenty years, and that his predecessors in title had held it without any intermission since May, 1839.

Herbert Wilson, K.C. (with him *Serjeant Matheson, K.C.*, and *L. R. Lipsett*), for the plaintiffs :—

It is perfectly plain that the defendant has been infringing the Patents, Designs, and Trade Marks Act, 1883. He has refused and declined to give any undertaking to discontinue the use of the Royal Arms in his receipts and letter-paper. He has been given every opportunity to recede from the position he took up. He has no defence. He has persistently acted in defiance of what he knew to be the rights of the plaintiff association. He does not contest their right. The same law as regards these matters applies in Ireland as in England. During the long correspondence that took place defendant contends that he is still entitled to use the Royal Arms in a business way by reason of a warrant granted to a former victualler seventy-four years ago to use the Viceregal Arms, but it is clear that he has no such right, because permission to use the Royal Arms, or arms so closely resembling the same as to be calculated to deceive, or the words "By Appointment" in connection with a trader's business, are only granted to persons who actually and habitually supply His Majesty, or a member of the Royal Family, at one of the Royal residences. Three years ago defendant was notified of this state of things. Defendant's case is, that because his predecessor in business got a warrant from a former Lord Lieutenant seventy-four years ago to use the Viceregal Arms, he is now entitled to use the Royal Arms. He does not even allege that he is now supplying goods to the present Lord Lieutenant, nor that he has received any permission from him to describe himself as a victualler "To His Excellency the Lord Lieutenant." He has been treated with the greatest forbearance by the plaintiffs, and every loophole for escape has been afforded to him. The injunction must be granted against him with costs. He has not acted bona fide in the matter.

The law on the question is clear. By sect. 106 of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), the

Barton, J. 1913.

ROYAL WARRANT HOLDERS' ASSOCIATION v. SULLIVAN.

user of the Royal Arms in connection with trade or business by a person "without the authority" of His Majesty, "or any of the Royal Family or of any Government Department" renders him liable on summary conviction to a fine not exceeding £20, and under section 68 of the Trade Marks Act, 1905 (5 Edw. 7, c. 15), such person may be restrained by injunction from continuing to use the same. The present case comes within that section. It is the first case of the kind in this country, but the matter has been frequently before the Courts in England. In *Royal Warrant Holders' Association* v. *Edward Deane and Beal, Limited* (1), it was held that the plaintiff association were entitled to an injunction restraining the defendants from using the Royal Arms in connection with their trade or business "on their premises or otherwise" in such manner as to be calculated to lead to the belief that they were duly authorized so to use them. In that case no such words as "By appointment" or any other words such as are generally used by Royal Warrant Holders were used in connection with the representation of the Royal Arms on the shop front; in that case the Royal Arms had been in the same position for many years before the premises were taken by the defendant therein. The case is not so strong a one as the present in that way, for the present defendant has persisted in doing what clearly leads the members of the public to believe that he was authorized to use the Royal Arms. No question arises in this case as to the defendant using the Arms in connection with his business. The Arms are used in such manner as to be calculated to lead to the belief that the defendant was duly authorized to use them: in fact, what he says is, that he believes that he was entitled to use the Arms because a long time ago a predecessor of his (seventy years ago) had a warrant granted to him. He uses the words "By appointment," the omission of which was strongly relied on by defendant in *Royal Warrant Holders' Association* v. *Edward Deane and Beal, Limited* (1), as showing that they could not be said to have used them in a way "calculated to lead to the belief" in section 68, on the part of customers or possible customers. Here, in addition to the display of the Royal Arms, there are the

(1) 1912] 1 Ch. 10.

words "By Appointment" or similar words. This is a case of an active user of the Royal Arms by a trader in his business who holds himself out to the public as a Royal Warrant Holder, which he is not. *In re Royal Warrant Holders' Association* v. *Slade & Co.* (1) was a case where a perpetual injunction with costs was granted at the instance of the plaintiff association as persons authorized to use the Royal Arms and authorized by the Lord Chamberlain to take proceedings. In that case (like the present) the Royal Arms were used by the defendants on their circulars, labels, and letter-paper, and other trade documents, which conduct (as in this case) must lead to the belief that they were authorized to use the Royal Arms.

S. L. Brown, K.C. (*P. Lynch, K.C.*, and *J. O'Byrne*, with him), for the defendant:—

This is the first case in which an action of this kind has been instituted in Ireland. The Royal Family is only represented in Ireland by the Lord Lieutenant. The statutes do not apply to him. The defendant has acted all through on a bona fide belief that he was entitled to use these Arms in connection with his business by reason of the grant to his predecessor in title by a former Lord Lieutenant, Viscount Ebrington. The business has apparently been carried on on the same lines and under the same title ever since the grant, and he has supplied His late Majesty King Edward VII, during his visit here. No doubt a bona fide belief that he was entitled to use the Arms will not excuse him if the law prevents him from doing so. But it is not a case in which costs should be given against him. In the long correspondence in the case defendant made it very clear that, so far as anything in the nature of advertisement was concerned, he was perfectly willing to give any required undertaking that he would withdraw anything calculated to lead the public to believe that he was a Royal Warrant Holder; but he makes it plain that so far as the display on his stationery, receipts, &c., is concerned, he would give no undertaking. There

(1) 25 Pat. Rep. 245.

Barton, J. 1913.

ROYAL WARRANT HOLDERS' ASSOCIATION v. SULLIVAN.

was really no active user by defendant of Royal Arms. He only continued the business on the same lines as it was formerly carried on by his predecessors in the trade. This device has been used for half a century, and no proceedings have been ever taken up to the present. The plaintiffs may be within their rights in bringing the action, and may be entitled to have a perpetual injunction; but it is clearly a case in which the Court will not give costs against the defendant. It is not really a case for proceeding by action in the High Court at all. The defendant could have been proceeded against before a magistrate, under section 106 of the Act, 1883, and the matter could have been cheaply disposed of. In all good faith the defendant believed both from the fact of the grant of Viscount Ebrington, and the fact that he had supplied King Edward VII, and been paid by Earl Dudley, that he was entitled to continue the display on his bill-heads and stationery of the Royal Arms. This is not a case like the English cases, where the result was that the public or customers were induced to believe that a particular victualler supplied the Royal Family. No person of ordinary intelligence would believe this in Ireland, as regards a trader in Dublin.

Under the circumstances, if the Court grants a perpetual injunction it should be without costs as against the defendant.

BARTON, J.:—

I feel no difficulty in holding that the defendant is using, without the requisite authority, the Royal Arms in connection with his business in such a manner as to be calculated to lead to the belief that he is duly authorized so to do. His user of the Royal Arms cannot be justified by the Lord Lieutenant's warrant to his predecessor in title, nor by the circumstance that on the occasion of a Royal visit he supplied the Sovereign's table. That being so, the plaintiffs, having brought these proceedings with the permission of the Lord Chamberlain, are entitled to an injunction. The case is covered by sect. 68 of the Trade Marks Act, 1905, and by the case of *Edward Deane and Beal, Limited* (1).

(1) [1912] 1 Ch. 10.

There remains the question of costs. I assume that the defendant has acted honestly, and that, until the matter was taken up by the plaintiffs, he was unconscious that the use of the Royal Arms was open to any legal objection. The Royal Arms have been used in connection with this business for a number of years without protest or interference from any quarter. It is also quite possible that a loose practice may have grown up in this city, and that the defendant has some excuse for feeling that it is a hardship that he should be selected as defendant. Where any irregular practice of this kind has to be stopped, somebody has to be selected as defendant, and he is the unlucky victim. But he was given ample opportunity of desisting from using the Royal Arms before the action was actually initiated; and he did not recognize, until it was too late, that he had no answer to the plaintiffs' claim for an injunction. Under the circumstances the defendant must pay the plaintiffs' costs.

The Court made the following order:—

The Court doth order that the defendant, Daniel Sullivan, be, and he is hereby, restrained from using the Royal Arms (or arms so closely resembling the same as to be calculated to deceive) in such manner as to be calculated to lead to the belief that he is duly authorized so to use the Royal Arms; and from using the title "By Special Appointment," "By Appointment," or any title to a similar effect, without the authority of His Majesty, or of a member of the Royal Family, in connection with his trade or business in such manner as to be calculated to lead to the belief that he is employed by, or supplies goods to, His Majesty or such member of the Royal family; and it is further ordered that the defendant do deliver up upon oath all documents, books, articles, and things on which the said arms or title appear in manner aforesaid, and which are in the possession or power, or under the control of the defendant; and it is ordered that the defendant do pay to the plaintiffs their costs of this action, such costs to be taxed by the taxing-master in case the parties differ; and the Court doth give liberty to the parties to apply as there may be occasion.

Solicitors for the plaintiffs: *Dobbyn & M'Coy.*
Solicitor for the defendant: *J. F. Culhane.*

R. W. L.

Appeal.
1914.

April 20, 21, 23.

In the MATTER of the ESTATE of LORD INCHIQUIN (1).

Land Purchase Acts—Compulsory purchase—Costs of sale—Jurisdiction of Judicial Commissioner to award costs—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *s.* 50—*Irish Land Act*, 1909 (9 *Edw.* 7, *c.* 42), *part* iv—*Land Commission Rules of* 16*th March*, 1897, *Order XLVI*, *Rule* 1.

The Judicial Commissioner has discretionary power under Order XLVI, Rule 1, of the Land Commission Rules of 16th March, 1897, enacted pursuant to sect. 50 of the Land Law (Ireland) Act, 1881, to award the costs of sale and of the redemption of superior interests as against the Land Commission to an owner of lands which have been compulsorily acquired by the Estates Commissioners under the provisions of Part IV of the Irish Land Act, 1909.

Appeal by the owner, Lord Inchiquin, from the order of Mr. Justice Wylie, made on the ruling of the final schedule of incumbrances in this matter on the 9th March, 1914, refusing the application of the owner that the costs of sale properly and necessarily incurred by him in the proceedings herein, when taxed and ascertained, up to and including all costs of and incidental to the distribution of the purchase-money, be ordered to be paid by the Land Commission.

Lord Inchiquin was entitled as tenant for life in possession to certain estates situated in county Clare. On the 17th April, 1911, the Estates Commissioners wrote to him making a proposal for the purchase, under sect. 6 of the Act of 1903, as amended by the Act of 1909, of portions thereof, consisting of certain tenanted and untenanted lands, comprising the lands of Mooghaun north, containing 228a. 0r. 22p., and Ballygirreen, containing 133 acres, and the lands of Mooghaun south, with part of Ayleacotty, containing 93a. 2r. 2p., all adjoining his demesne of Dromoland, at the sum of £6658. The owner objected to this proposal on several grounds. On the 14th June, 1911, the Estates Commissioners sent two final offers, under sect. 43 of the Act of 1909, one for the purchase of the said lands of Mooghaun north and Ballygirreen at the sum of £5645, and the other for the purchase

(1) Before O'Brien, L.C., Palles, C.B., and Holmes, L.J.

of the said lands of Mooghaun south, with part of Ayleacotty, at the sum of £1013. These final offers were not accepted, and were duly published in the *Dublin Gazette*, pursuant to the provisions of Part IV of the Act of 1909. The owner thereupon served two notices of motion, objecting on certain statutory grounds to the acquisition of the lands respectively mentioned in the said final offers. Before these applications came on for hearing, the Estates Commissioners made a new proposal whereby they offered to forego their claim to 86A. 2R. 30P., of the lands of Ballygirreen, and to take instead 296A. 3R. 22P. of the adjoining lands of Ballynacragga, together with the other lands mentioned in the final offers. They thereupon withdrew the two final offers already published, and on the 17th January, 1912, made a new proposal for the purchase, under sect. 6 of the Act of 1903, as amended by the Act of 1909, of the said lands at the sum of £10,022. The owner objected on the ground of inadequacy of price. On the 27th February, 1912, the Estates Commissioners sent a final offer, under sect. 43 of the Act of 1909, for the purchase of the said lands at the said sum. This final offer was not accepted, and was duly published in the *Dublin Gazette*. The owner thereupon applied to Mr. Justice Wylie to fix the price under sect. 63, sub-s. 1, of the Act of 1909. On the 20th June, 1912, Mr. Justice Wylie fixed the price at the sum of £10,690, and allowed the owner the costs of the application, to be paid by the Land Commission. The final schedule of incumbrances was duly vouched. Appearing thereon were two head rents and a mortgage vested in the Representative Church Body. The owner claimed that the costs of making title to these, as well as to the residue, and all costs of and incidental to the compulsory acquisition of the lands by the Estates Commissioners, should be paid by the Land Commission.

The judgment of Mr. Justice Wylie was as follows:—

WYLIE, J.:—

In this case a question is raised, at No. 8, on the final schedule, as to whether the costs of sale are payable out of the purchase-money or by the Land Commission. The estate has been

Appeal. 1914.

In re Lord Inchiquin's Estate.

purchased by the Land Commission under the compulsory powers conferred by the Act of 1909, and, on this ground, the owner contends that the costs of sale are payable by the Land Commission.

It was not and could not be suggested that, in the case of all sales under the Land Purchase Acts prior to the Evicted Tenants Act of 1907, the costs of sale were not paid by the vendor or out of the purchase-money, though there were some provisions in the Acts, such as sect. 14 of the Act of 1885, and s. 23, sub-s. 13, of the Act of 1903, requiring the Land Commission to do certain work connected with the sale without charge to the vendor. Then sect. 5, sub-s. 3, of the Evicted Tenants Act, where lands are taken compulsorily, requires the Land Commission to pay certain specified costs and expenses connected with the sale and distribution of the purchase-money. But when we come to the compulsory provisions of the Act of 1909, there is no provision for the payment of costs except sect. 63, sub-s. 3, which gives a discretionary power to the Judicial Commissioner to order the costs of certain applications by way of appeal from the Estates Commissioners to be paid by the Land Commission or the Congested Districts Board; and, in this case, in exercise of that discretionary power, I ordered the Land Commission to pay the vendor the costs of an appeal. But this sub-section has, in my opinion, no application to the general costs of sale. Besides, section 64 provides that in the case of a compulsory purchase under the Act of 1909, "all the like consequences shall ensue as if the estate . . . had been purchased by the Land Commission . . . by agreement entered into under the Act of 1903." Counsel for the vendor referred to the fact that where lands are taken compulsorily under the Lands Clauses Acts, the undertakers have to pay costs, but those Acts expressly impose a liability to pay certain costs, and owners can only recover such costs as the statutes give them.

On these grounds I hold that the costs of sale, other than those given by my order of the 20th June, 1912, are payable out of the purchase-money.

Jellett, K.C., and *J. E. Walsh*, for the appellant:—

The Judicial Commissioner has jurisdiction under Order XLVI, Rule 1, of the Rules of 1897, to order the costs of sale to be paid by the Land Commission. That order was made pursuant to the jurisdiction given by sect. 50 of the Act of 1881. The jurisdiction as to costs in Land Commission matters given by that section is even wider than that conferred on the Court in England by sect. 5 of the Supreme Court of Judicature Act, 1890. The development of the jurisdiction as to costs in England is traced in Cripps on Compensation (5th Ed., p. 257). Before the Judicature Acts the Court had no power to award costs in proceedings under statute, except such costs as the statute authorized. The Supreme Court of Judicature Act, 1875 (which contained a similar provision to sect. 53 of the Judicature Act (Ireland), 1877), and Order LV, Rule 1, of the Rules of the Supreme Court, 1883 (corresponding to Order XLV, Rule 1, of the Rules of the Supreme Court (Ireland), 1905), placed all costs, subject to certain specified exceptions, of and incident to proceedings in the Supreme Court in the discretion of the Court or judge. But it was held that this did not give the Court power to award costs in cases where the special statute was silent on the point: *In re Mill's Estate* (1), in which *Ex parte Mercer's Company* (2), where the contrary had been held, was not followed. The powers of the Court in England have, however, been extended by sect. 5 of the Supreme Court of Judicature Act, 1890. Under that section it has been held that the Court has power to give costs of and incidental to a petition for payment out of moneys under an Act which contains no provisions as to such costs: *In re Fisher* (3); and to give costs in cases under sect. 80 of the Lands Clauses Act, 1845, in which such power is expressly excepted: *In re Schmarr* (4). The special sections in the Land Purchase Acts relied on by Wylie, J., in his judgment should not be construed as ousting jurisdiction. Sect. 5, sub-s. 3, of the Evicted Tenants Act, 1907, may be read either as designating the fund out of which costs are to be paid, or as making the awarding

(1) 34 Ch. D. 24.
(2) 10 Ch. D. 481.
(3) [1894] 1 Ch. 450.
(4) [1902] 1 Ch. 326.

Appeal. 1914.

In re Lord Inchiquin's Estate.

of costs compulsory instead of being discretionary. Sect. 63, sub-s. 3, of the Act of 1909 should be read, not as taking away from, but as adding to, jurisdiction. In *In re Walter's Estate* (1), Meredith, J., held that, in cases submitted for the opinion of the Judicial Commissioner under sect. 23, sub-s. 1, of the Act of 1903, he had no jurisdiction to award costs, the reason being that, at that stage of the sale, the estate was under the jurisdiction of the Estates Commissioners, and might never come under his jurisdiction. The same reason, whether that view was right or wrong, is sufficient to account for the special provision as to costs in the sub-section in question, and the Judicial Commissioner is thereby given jurisdiction to award costs at the stage when the matter is still under the jurisdiction of the Estates Commissioners. Then as to sect. 64 of the Act of 1909, the primary object of that section is to fix the date of the statutory agreement, which is essential for determining questions as to conversion, solvency as to income for the purpose of the bonus, and many others. All like consequences are to ensue as if the estate had been purchased by the Land Commission by agreement as of that date. One of these consequences is that the Judicial Commissioner exercises his discretion in each individual case as to how the costs of sale are to be borne. As a general rule of practice, he exercises that discretion by ordering them to be paid out of the purchase-money, which, in the case of settled estates, he has power to do under sect. 21 (*x*) of the Settled Land Act, 1882. Cases may arise where this general rule should be departed from. For instance, if an estate were put to any additional costs by reason of a mistake arising in the Estates Commissioners' department, the Judicial Commissioner would have jurisdiction, in the exercise of his discretion, to order such costs to be paid by the Land Commission. Similarly, where the element of compulsion comes in, it is only right that he should have the same jurisdiction, and that it should be invoked. Under sect. 63, sub-s. 2, of the Act of 1909, in fixing the price of land taken compulsorily, regard is to be had to the fair value of the same to the owner. How can the owner get the fair value if there is no jurisdiction to give him the costs of sale, and if these as well as

(1) [1906] 1 I. R. 17.

the costs of superior owners and incumbrancers are to be deducted from the sum so fixed? Under Order XLVI, Rule 13, of the Rules of March, 1897, every owner of a superior interest, and every incumbrancer, is entitled to his costs with his demand, unless the commissioner otherwise directs. That rule was made pursuant to the jurisdiction conferred by sect. 50 of the Act of 1881, and was founded on the principles laid down by Bewley, J., in *In re Leconfield's Estate* (1). The basis of that decision was that, as the owner was compulsorily redeeming his superior owners and incumbrancers, it was just and right that he should indemnify them against costs. Here the Estates Commissioners have compulsorily bought out the owner. If there was jurisdiction to award costs against the persons who invoked the compulsory powers in the one case, there must be the same jurisdiction in the other.

The Solicitor-General (*Jonathan Pim, K.C.*) and *M'Afee* for the Treasury:—

Wylie, J., considered that he had no jurisdiction to award the costs in question, and we submit that he was right in this view. Order XLVI, Rule 1, of the Land Commission Rules of 16th March, 1897, confers no such jurisdiction. Sect. 50 of the Act of 1881, under which this Rule was made, was never intended by the Legislature to confer such wide powers as to costs as is contended for; and if Order XLVI has the effect suggested, it is *ultra vires*. The only effect of sect. 50 was to give the Land Commission the same power of dealing with costs as was then vested in the High Court of Justice in Ireland by sect. 53 of the Judicature (Ireland) Act, 1877. Neither sect. 50 nor Order XLV, Rule 1, gives the Court power to award costs in cases where the special statute is silent on the point: see *In re Metford* (2); *In re Mills' Estate* (3). *In re Foster* v. *Great Western Railway Co.* (4) shows the limitation on the jurisdiction of the Railway Commissioners to award costs under sect. 28 of the Regulation of Railways Act, 1873, although that section places the

(1) 25 I. L. T. R. 28.
(2) 6 Jur. (N. S.) 796.
(3) 34 Ch. D. 24.
(4) 8 Q. B. D. 515.

Appeal. 1914.

In re LORD INCHIQUIN'S ESTATE.

costs "of and incidental to any proceedings before the Commissioners" in the discretion of the Commissioners. In *Leconfield's Estate* (1), Bewley, J., adopted this view of the limited powers conferred upon the Land Commission by sect. 50. He says that the discretion as to costs given to the Commissioners by 107*a* of the Rules of 5th December, 1887, which were made under powers conferred by the 50th section of the Act of 1881, "is a judicial discretion, and is certainly not larger than the discretion exercised by the High Court of Justice in Ireland under the 53rd section of the Supreme Court of Judicature (Ireland) Act, 1877, and by the High Court of Justice in England under the original English Order LV, Rule 1." It was the existing limitation on the powers of the High Court in England to deal with costs, as illustrated in *In re Mills' Estate* (2), which led to the enactment of sect. 5 of the Judicature Act, 1890: see judgment of Lindley, L.J., in *In re Fisher* (3); *In re Schmarr* (4). It is obvious that some limitation must be placed on the powers of the Commissioner over costs. Under Order XLVI, Rule 1, the "full power and discretion as to the giving of costs and expenses, and as to the persons by whom . . . the same shall be paid," would not empower the Commissioner to award the costs of sale to be paid by a stranger to the transaction, or by the purchasing tenant. In any case "the Commissioner" in Order XLVI, Rule 1, does not refer to the Judicial Commissioner: see Order I, Rule 1, of Rules of 16th March, 1897, "Construction of Terms," where "Commissioner" is defined as meaning "one of the Irish Land Commissioners," while "the Judicial Commissioner" is separately defined. The provisions of the Irish Land Act, 1909, are strongly against the appellant's contention. Under section 43, sub-s. 3, on the failure of negotiations to purchase, the Estates Commissioners are empowered to send in a final offer for the purchase of the estate or untenanted land; and if the offer is accepted within the specified time, "the offer and acceptance shall . . . have the same effect as an agreement for the purchase of the estate or untenanted land . . . , and the like consequences shall ensue . . . as in the case of such an agreement." One of the "like consequences" is that the costs of

(1) 25 I. L. T. R. 28.
(2) 34 Ch. D. 24.
(3) [1894] 1 Ch. 450, at 451.
(4) [1902] 1 Ch. 326.

making title to the lands and of redeeming superior interests should come out of the purchase-money of the lands. The vendor cannot be in a better position with regard to costs by reason of his refusal to accept the offer of the Estates Commissioners. Where, as here, he refuses to accept the offer, the Judicial Commissioner, under sect. 63 of the Act of 1909, is, on the application of any person interested in the estate, to fix the price; but no additional allowance is to be made in respect of the purchase being compulsory (sect. 63, sub-s. 2). Therefore the vendor is in no better position than if he had sold voluntarily under the Act of 1903, or had accepted the offer of the Estates Commissioners under this Act. Sub-s. 3 of sect. 63 expressly provides for the costs and expenses of any application under Part IV of the Act being in the discretion of the Judicial Commissioner, but no general power of awarding costs is conferred upon him. If the Legislature had intended to confer such a power, it would have been expressly provided for, as was done in sect. 5, sub-s. 3, of the Evicted Tenants Act, 1907.

Jellett, K.C., in reply.

O'BRIEN, L.C.:—

Although the question in this case is one of considerable importance, it has been so carefully and exhaustively argued by counsel on both sides that I do not think anything would be gained by our reserving judgment, and, indeed, in a case of this kind, when we have had the assistance of such eminent counsel, who have directed our attention to every conceivable point in the case, it is better to give judgment when all the facts of the case and the sections of statutes applicable to it are fresh in one's mind than after a lapse of time.

In this case the Estates Commissioners, acting under the special jurisdiction conferred on them by the Irish Land Act, 1909, have set in motion the machinery which enables them to acquire compulsorily the interest of Lord Inchiquin in certain lands. They, in the first place, in strict pursuance of the terms of the Act, made an offer to purchase the lands for a sum of

Appeal. 1914.

In re Lord Inchiquin's Estate.

O'Brien, L.C.

£10,022. Lord Inchiquin, being dissatisfied with that offer, applied to the Land Commission pursuant to sect. 63 of the Act of 1909 to fix the price to be paid, and, accordingly, on the 20th June, 1912, Wylie, J., the Judicial Commissioner of the Irish Land Commission, fixed the purchase price at the sum of £10,690.

Now, in fixing the price under sect. 63, regard is to be had to the fair value of the estate to the owner, but no additional allowance is to be made in respect of the purchase being compulsory; and sub-s. 3 of sect. 63 contains a provision by which the Judicial Commissioner has power at his discretion to award certain costs arising out of proceedings taken under that section before him. An argument has been addressed to us based on the terms of sect. 63 in support of the contention of the Land Commission.

The proposition argued on behalf of the Land Commission, represented here by the Solicitor-General, is clearly stated by him, and, as I understand, his judgment was accepted by Wylie, J., and is, that there is no power or jurisdiction whatsoever vested in the Judicial Commissioner enabling him to award to the owner of the lands compulsorily acquired any costs or expenses which he may have been put to through having to make title to the lands in the course of the proceedings to carry out the compulsory sale, or the costs or expenses of the redemption of superior interests. That is a question solely, so far as this Court is concerned, of jurisdiction to make an order for the vendor's costs; we cannot, in this or any other case, suggest in what manner the jurisdiction, if it exists, ought to be exercised, and the question turns, as it seems to me, on a few clear sections and orders made under the Land Purchase Acts, with respect to the effect of which I entertain no reasonable doubt.

Under sect. 50 of the Land Law (Ireland) Act, 1881, which is incorporated with and forms part of the entire land purchase code, including the Act of 1909, which enables lands to be compulsorily acquired, there is vested in the Land Commission a jurisdiction to make rules with respect to the various matters enumerated in that section, or any of them; these are of a very exhaustive character, including proceedings on the occasion of sales under the Act of 1881, and it is not contended that the

power of making rules would not apply to sales under any of the amending Acts consolidated with and to be read with the Act of 1881.

Now, included in the matters with respect to which rules may be made under this section are by clause (k) "the scale of costs and fees to be charged in carrying this Act into execution, and the taxation of such costs and fees, and the persons by or from whom and the manner in which such costs and charges are to be paid or deducted, subject nevertheless to the sanction of the Treasury as to the amount of fees to be charged"; and by clause (o) there is added, "any other matter or thing, whether similar or not to those above mentioned, in respect of which it may seem to the Land Commission expedient to make rules for the purpose of carrying this Act, or any part of any Act incorporated herewith, into effect.",

Purporting to act under the jurisdiction conferred upon them by that section, the Land Commission have made certain rules of the 16th March, 1897, and by Order XLVI, Rule 1, it is provided that "the Commissioner shall have full power and discretion as to the giving or withholding of costs and expenses, and as to the persons by whom and the funds out of which the same shall in the first instance or ultimately be paid, repaid, or borne, and may apportion the same amongst such parties, and in respect of interest, rents, or income and principal, or corpus, as they shall think fit."

It is difficult to conceive any clearer or fuller words for the purpose of giving jurisdiction to the Judicial Commissioner, who, I consider, is certainly, amongst others—and that is enough for my purpose—"the Commissioner"; and can it be said that this rule is in excess of the jurisdiction given to the Land Commission by the Act of 1881? It follows, as I consider, without extending, the words of the section which confers the jurisdiction, and the only question to my mind is as to what subject-matters the rule applies.

There is no difficulty, however, in ascertaining that, because the later rules in that General Order deal with cases where title has to be made to that class of interest in land which is called a "superior interest," and a full scale of fees dealing with

Appeal. 1914. *In re* Lord Inchiquin's Estate. O'Brien, L.C.

cases of making title and everything necessary for the purposes of the investigation of title is provided by the schedule to the rules. In addition to that, Rule 13 of Order XLVI expressly provides that every owner of a superior interest, and every incumbrancer, shall have, with his demand, his costs properly incurred, including the costs of proving his demand, unless the Commissioner shall otherwise direct. The importance of Rule 13 does not appear at first sight, but a great part of the argument of appellant's counsel in this case has turned, and rightly turned, on the jurisdiction which the Land Commission has exercised in respect of the compulsory redemption under the Act of superior interests, which, in many cases, are actual estates in the land. At an early date it was decided by Bewley, J., in *Leconfield's Estate* (1) that the Court of the Land Commission had jurisdiction to order payment out of the purchase-money of the costs of making title and so forth of persons whose superior interests were compulsorily redeemed; and although there is a reference in the judgment of Bewley, J., to certain matters in connection with the administration of the Judicature Act and the powers of a judge of the High Court thereunder, I take that judgment to have been based on the general jurisdiction as to costs given by the General Order then in force, and which is similar to Order XLVI, which order depends for its validity on sect. 50 of the Act of 1881, and does not, as I have said, in my judgment, violate the terms of that section.

That case of *Leconfield's Estate* (1)has been followed in a number of cases from its decision down to the present time; it came incidentally before this Court in *Borrowes' Estate* (2), and there is no question but that quite apart from the special facts of that case there was a distinct recognition by this Court of the power of the Land Commission to give costs to the owner of a superior interest whose interest was redeemed compulsorily, and of the fact that that power flowed from the provisions of Order XLVI, Rule 1.

Now, it is clear that in the case of compulsory acquisition of land, where the statute giving the compulsory power or some

(1) 25 I. L. T. R. 28 (2) [1912] 1 I. R. 97.

other statute does not confer the power to award costs to an owner, there is no jurisdiction as a rule to award them, but when power to do so is given, either expressly, or in general terms applicable to every case, the power exists and flows, not from the inherent jurisdiction of the Court, but from the Act of Parliament itself, and it is, to my mind, clear that so far as the redemption of superior interests is concerned, the Land Commission have authority vested in them to award costs to the owners of such interests under the combined operation of sect. 50 of the Act of 1881 and Order XLVI; and even if I did not hold that view, I consider that I should follow what I conceive to have been accepted as law in *Borrowes' Estate* (1).

Once one gets to that, so far from there being any difficulty in extending the jurisdiction to award costs to cases of compulsory acquisition of land itself, the difficulty, to my mind, would be not in extending it, but in excluding it; to say that you are to draw a distinction between the compulsory acquisition of a superior interest (which really may be an estate in land of enormous value) and the compulsory acquisition of the land itself, and that there is jurisdiction to award costs to the owner in the one case and not in the other, although the power arises only under the one section and General Order, is an argument I cannot acquiesce in. It appears to me that as the jurisdiction to award costs flows from the statute itself in the case of superior interests, the same jurisdiction must flow from the same source in other cases. It would be sufficient for my judgment to end there, but for the contentions raised against that interpretation.

It has been contended in the first place that sections 63 and 64 of the Act of 1909 show on the face of them, or at any rate by internal evidence, that the Legislature intended to do a thing which would not *prima facie* strike one as fair, namely that under no circumstances was the Court given power to award costs of this nature. I think, however, that the view put forward by the appellant's counsel as to sections 63 and 64 of the Act of 1909 is sound, and that sub-s. 3 of section 63 is not to be read as in the nature of taking away jurisdiction, but as adding to jurisdiction.

(1) [1912] 1 I. R. 97.

Appeal. 1914. *In re* Lord Inchiquin's Estate. O'Brien, L.C.

It had been decided that, prior to the time when the money was brought to credit after *prima facie* title had been made and the advance sanctioned, the Land Commission had not jurisdiction under Order XLVI to make an order as to costs. It is suggested that it was owing to this decision, based on a technical construction of the statutes which may or may not have been right (it is not necessary to express an opinion as to that), that sub-sect. 3 was enacted, and I certainly do read this sub-section as supplying the deficiency, so that by force of it and Order XLVI jurisdiction is conferred to give the vendor costs in respect of the series of transactions beginning with the decision of the Judicial Commissioner, ending so far as the section is concerned with the bringing of the purchase-money to credit, and then beginning again, and ending with the close of the proceedings.

The second objection raised was this, that in the Evicted Tenants Act of 1907, sect. 5, there is contained an express provision that the costs of making title are to be paid out of the same fund which was to indemnify the Estates Commissioners within the first sub-section in respect of their costs and expenses. I think that section does not help us at all in the present case; I accept Mr. Jellett's argument, namely that its object was to provide a fund; and I think also that the section can be read in this way, viz., that the awarding of costs was, instead of being discretionary, to be compulsory. That does not, to my mind, afford an argument in support of the taking away of discretionary powers otherwise vested, as I consider, in the Land Commission; and accordingly I hold that there is jurisdiction in the Judicial Commissioner, if he so thinks right in the exercise of his discretion, to give costs to a vendor in the position of Lord Inchiquin.

He has refused to do so in the present case, on the ground that he had no jurisdiction. That being so, my judgment is—and I think that the other members of the Court concur—that the order of the Court on the face of it should show that as the learned Judicial Commissioner has not exercised the discretion vested in him, the case should go back to him to exercise that discretion; but as to the particular way in which he should exercise it, in this or any other case, I refrain from expressing an opinion. It would be wrong for this Court to lay down any fixed rule as

to the manner in which he shall exercise his discretion; that is a question to be decided by him in each concrete case which comes before him, and may not be the same in one case as in another.

PALLES, C.B.:—

I agree with the Lord Chancellor. The case has been argued by both sides upon the basis that the decision of the learned judge below was not an exercise of discretion, but that he declined to exercise his discretion upon the application that the appellant should be given the costs applied for, on the ground that he had no jurisdiction to do so. It is upon that basis alone that the case comes before us, because of course no appeal lies from an order as to costs which are in the discretion of the Court.

By the Irish Land Act of 1909, a jurisdiction to acquire lands in certain cases compulsorily, *i.e.* without the consent of the owner, is vested in the Land Commission. That Land Commission was an existing Court, having an existing practice and existing powers well known to the Legislature, and my opinion is that the giving of a new jurisdiction to a Court of that description indicates an intention on the part of the Legislature that it should exercise that jurisdiction according to its existing rules and practice, and that its existing powers should apply to the new jurisdiction, unless an intention to the contrary is shown on the face of the Act.

The portion of the Act of 1909 conferring this power is to be treated as part of the Land Purchase Code, and, in considering the general jurisdiction conferred upon the Land Commission for the purpose of carrying out this Land Purchase Code, we find under Order XLVI of the rules of March, 1897, the following provision:—

[His lordship read Order XLVI, Rule 1, and continued.]

A great part of the argument here has turned on the validity and application of that order. It has been said that the Land Commission had no jurisdiction to make it, and also that, even if there were jurisdiction to make it, there is sufficient on the face of the Act of 1909 to show an intention of the Legislature that it should not apply to the new jurisdiction conferred by that Act.

Appeal.
1914.
In re LORD INCHIQUIN'S ESTATE.
Palles, C.B.

The power of the Land Commission to make rules under the Land Purchase Code is conferred by the Act of 1881, and I cannot conceive any more extensive power of making rules in respect of the particular subject-matters mentioned than is conferred on the Land Commission by the section referred to by the Lord Chancellor, the 50th section of the Act of 1881.

[His lordship referred to clauses (k) and (o), and continued.]

I agree with the argument of the Solicitor-General that there must be some restriction placed on the second part of clause (k) "and the persons by or from whom . . . such costs are to be paid." In a litigation before the Land Commission in reference to an estate between the owner and an incumbrancer it would not be competent for the Land Commission to order that the costs should be paid by a mere stranger to the estate and to the litigation; but under a section of that description jurisdiction exists enabling rules to be made directing costs to be paid by the person who applies to the Court for the exercise of its jurisdiction, and that is the only matter material here. Here we are dealing with an application by the Land Commission to the Court of the Land Commission to put into force the powers conferred by the Act of 1909, and I hold that it is impossible to argue that under the Act of 1881 there is not power to make a rule directing that persons making such an application as that are subject to the jurisdiction of the Court in reference to costs.

I assume then that this Order XLVI is a valid order, and I come to the second argument to see whether there is anything in this Act of Parliament of 1909 that will prevent the application to the new jurisdiction of the 46th General Order. To my mind it would require something very clear on the face of the Act to arrive at such a conclusion as that. The indication on the face of this Act which it is said will prevent this result ensuing, is that when this 46th Order was made, speaking generally, the Acts in force were applicable to purchases by agreement, while by this Act the principle is introduced of compulsory purchase; and the first argument relied upon is founded on section 63. A right of appeal to the Judicial Commissioner upon particular grounds is given by sub-sect. 1 of that section in reference to a compulsory purchase, and by sub-sect. 3 it is provided that "the costs and

expenses of and incidental to any application under this part of this Act shall be at the discretion of the Judicial Commissioner, and the Judicial Commissioner may, if he thinks fit, order the same to be paid by the Land Commission, or the Congested Districts Board."

These words confer a power on the Judicial Commissioner under a new and particular jurisdiction; and if we can find a subject-matter which answers to these words used in their ordinary and primary sense, we ought to adopt that instead of trying, as is suggested here, to use them as cutting down existing powers.

Now, rightly or wrongly, it was held by Meredith, J., that, as under the Act of 1903 the jurisdiction of the Judicial Commissioner arises under the part of the Act commencing with section 24, which directs the lodgment in Court of the purchase-money, there was no jurisdiction in the Judicial Commissioner to give costs in relation to proceedings before him which took place prior to the lodgment of the purchase-money.

Were this correct, it showed that a *casus omissus* had occurred in the Act of 1903, and when a right of application to the Judicial Commissioner to restrain the lands being acquired under the Act is given by sect. 62 of the Act of 1909, and an appeal as to prices by section 63, it was rendered essential for the purposes of justice that jurisdiction should be given in respect of the costs of the proceedings I have mentioned, and this was exactly what was done by sub-sect. 3 of section 63.

Then it is said that by the Evicted Tenants Acts there are enacted certain provisions in respect of costs and expenses which are not to be found in the Act of 1909. It is a very dangerous process in construing an Act of Parliament to pass away from the Act in question, and to hold that, by reason of the non-repetition in it of particular provisions deemed essential in some other Act, we ought to place a limitation upon the words of the code we are dealing with. The introduction of the sections referred to in the Evicted Tenants Act can be explained by either of the methods suggested by Mr. Jellett, namely, either that it was intended to point out the fund provided by Parliament which was to be made applicable to the payment of the costs in

Appeal. 1914. *In re* Lord Inchiquin's Estate. Palles, C.B.

question, or that the awarding of costs should be compulsory and not in the discretion of the Court.

When, however, a new jurisdiction is given to an existing Court, that new jurisdiction is to be exercised according to the practice of that Court, and under the powers incident to that practice.

The Solicitor-General has said that it is not necessary to hold that the principles applicable to purchase by agreement are identically applicable to compulsory purchase. It certainly is not, but the question is not what it is necessary that the Act should have done, but what it has done; but, as the matter has been mentioned, I may say that the provision in sect. 63, sub-s. 2, as to fixing the price of the estate, seems to me to have made it prudent, to say the least, that the tribunal should have the power in each particular case of exercising a discretion as to the mode in which the costs incurred in the Court should be borne. In my judgment, the discretion of the judge is to be exercised in each case according to the circumstances of the case, and I consider that under no circumstances could that discretion be properly exercised if there was an omission to take into consideration the fact that the purchase was compulsory and not voluntary. I can find nothing in the new Act inconsistent with the application of that rule.

In my opinion the case ought to be remitted to Mr. Justice Wylie; and our order ought to show on its face that the only matter we have considered is the question of his jurisdiction to exercise a discretion as to the costs in question. As to the mode in which he should exercise that discretion I say nothing.

Holmes, L.J.:—

This appeal has been taken in the course of a compulsory purchase by the Land Commission of lands, the property of Lord Inchiquin, under the powers conferred by the Irish Land Act, 1909, Part IV. In the course of these proceedings Lord Inchiquin, being dissatisfied with the final offer made to him, applied to Wylie, J., to fix the price, which was considerably increased by the

judge; and the costs of this application were directed to be paid as provided by sect. 63, sub-s. 3. The price having been lodged, and ripe for allocation, Lord Inchiquin applied to the Judicial Commissioner that the Land Commission be ordered to pay to him the other costs to which he had been put by the compulsory purchase, consisting substantially of his costs in deducing title; and the appeal under consideration is from the refusal of this application. The sole question discussed in this Court has been whether Wylie, J., had jurisdiction to make the order asked for. If he had such jurisdiction, and if in declining to do so he had exercised his judicial discretion, it is admitted that the appeal would not lie. But his oral judgment (of which we have read a copy) seems to us to be directed to showing that he had no authority relating to any costs save those on which he had already adjudicated; and as the Solicitor-General's argument in support of the order has been confined to the same proposition, I think we ought to decide it. The conclusion at which we have all arrived has been announced; but it is to be noted that our judgment is strictly confined to the single point. For my own part, I have formed no opinion as to how the judge to whom the discretion is given ought to exercise it. My reason for holding that the Judicial Commissioner was at liberty to make the order asked for can be briefly stated.

The Act of 1909 forms part of the Irish Land Code, beginning with the Land Law (Ireland) Act, 1881. This legislation deals with many matters relating to Irish land, one of the most important of which relates to the purchase of land with the help of public money, and for the benefit of the farming community. A body described as a Land Commission was created by the Act of 1881, the constitution of which has been altered by subsequent statutes; and various duties, both judicial and administrative, have been from time to time imposed on it. As might have been expected, Parliament has given this tribunal power to make rules, and when made to rescind, amend, or add to them, with respect to certain matters specified in sect. 50 of the Act of 1881, amongst which in clause (k) are included "The scale of costs and fees to be charged in carrying this Act" [extended afterwards to each successive Act] "into execution, and the taxation of such costs and fees, and the

Appeal. 1914. *In re* Lord Inchiquin's Estate. Holmes, L.J.

persons by or from whom and the manner in which such costs and charges are to be paid or deducted, subject nevertheless to the sanction of the Treasury as to the amount of fees to be charged." Rules have been made pursuant to this authority, and Order LXVI, Rule 1, which has been in force since 1897, is relied on as giving jurisdiction to deal with the application relating to the costs of Lord Inchiquin in making title. I am of opinion that its language is amply sufficient for this purpose. It is true that it has not heretofore been used in a case like the present; but such a case could only have arisen recently. For upwards of twenty years after the Act of 1881, sales under the Irish Land Code were sales based upon contracts. The owner of land agreed with his occupying tenants to sell them their holdings, and arranged with them the price which, or part of which, the Land Commission consented to advance in the manner provided by the Land Code. The vendor, like any other landed proprietor who had contracted to sell, was bound to show good title at his own expense, and there was no other fund that could be called on to pay his costs of doing so. In these sales, however, there were frequent applications analogous to that of Lord Inchiquin. The lands agreed to be sold were often subject to a head-rent, annuity, or other outgoing, described as a superior interest; and at an early stage in the history of the Land Purchase legislation it was provided that interests of this kind must be redeemed out of the purchase-money at the price fixed by the Judicial Commissioner. In this transaction there was no element of contract. The owner of the superior interest was obliged to part with it for a sum over the amount of which he had no control; and he was put to expense in showing his title, and to other costs in connection with the redemption. The Judicial Commissioner has been in the habit of directing the payment of these costs out of the price of the lands; and this Court has gone further, for in a case where the purchase-money was not sufficient to redeem in full a superior interest, it held that the judge had jurisdiction to direct the owner of the lands to pay these costs, and upon appeal we made an order to this effect. The authority under which these rulings as to costs have been made is Order XLVI, Rule 1; and I am of opinion that it is quite sufficient to justify them. Compulsory purchase, such

as has taken place in this case, by the Land Commission, is authorized, as I have already said, by the Irish Land Act, 1909, Part IV. If this statute contained no reference to the power of the Judicial Commissioner to direct the payment of costs, it is, I think, clear that the same rule would apply and give him jurisdiction to adjudicate in relation thereto in the exercise of his discretion. But it is argued that Part IV has, in sect. 63, a special provision relating to costs which prevents the Judicial Commissioner, when administering this portion of the code, from applying Order XLVI, Rule 1, and, indeed, every other enactment on this subject.

The following is the provision referred to—"The costs and expenses of and incidental to any application under this part of this Act shall be at the discretion of the Judicial Commissioner, and the Judicial Commissioner may, if he thinks fit, order the same to be paid by the Land Commission or the Congested Districts Board." I cannot accept the proposition that this sub-section has the effect of cutting down any jurisdiction over costs previously vested in the Judicial Commissioner. Holding, as I do, that under Order XLVI, Rule 1, he had authority to give Lord Inchiquin the costs of showing his title to the lands compulsorily purchased, I cannot hold that there is anything in this provision to take it away. It may be asked why, then, was it enacted, if it is mere surplusage. My answer is that it may not be surplusage. It would be surplusage if it referred to the costs of making title; but it relates to the costs of applications made long before any costs as to title would be incurred; and I am informed that it has been decided by the Judicial Commissioner that his power to deal with costs only arises upon the lodgment of the purchase-money. I offer no opinion as to whether this decision is right or wrong, but I can understand Parliament preventing its being followed in a certain class of cases.

Solicitor for Lord Inchiquin: *MacMahon & Tweedy.*
Solicitor for the Treasury: *J. F. Donnelly.*

R. ST. J. C.

Ross, J.
1914.
June 4, 14.

SHEANE *v.* FETHERSTONHAUGH.

Land Judge—Absolute order for sale—Conversion.

An absolute order for the sale of real estate made by the Land Judge on the petition of an incumbrancer operates as a conversion of so much only of the lands as is required to be sold for the discharge of incumbrances. The remainder of the real estate, if unsold, remains and devolves as real estate.

Stinson's Estate, [1910] 1 I. R. 13, distinguished.

ORIGINATING SUMMONS.

The plaintiff was the heir-at-law of Willoughby Leech Sheane, deceased, and the defendant was his administrator. W. L. Sheane had been the owner of certain lands in respect of which a petition for sale had been presented in the Land Judge's Court by the National Bank, Limited, as incumbrancers. An absolute order for the sale of all the lands mentioned in the petition was made by the Land Judge on the 26th October, 1894, and a receiver was appointed over them. Pursuant to the order for sale, portion of the lands was sold, but portion, consisting of real estate, remained unsold. Willoughby Leech Sheane died on 27th July, 1901. All the incumbrances on the estate of the deceased having been discharged, the said petition was, on the application of the plaintiff, dismissed and the receiver discharged, by order dated 2nd February, 1914.

The plaintiff brought the present summons for the determination of the question whether the absolute order for sale operated as a conversion into personalty of all the real estate of the deceased thereby ordered to be sold, or only of so much of the real estate ordered to be sold as was in fact sold under such order.

Hubert Hamilton, for the plaintiff:—

The unsold land must be taken by the owners as they find it. It was not sold by the Court, and still remains real estate and

passes to the heir-at-law of the deceased owner: *Stinson's Estate* (1). *Hyett* v. *Mekin* (2) and *Fauntleroy* v. *Beebe* (3) are distinguishable. Section 64 of the Landed Estates Court Act directs that the surplus purchase-money after payment of incumbrances shall, in the case of settled property, be re-invested in lands.

W. G. Gibson, K.C., for the defendant:—

The English cases decide that an order for sale in an administration suit, or in a partition suit, converts real estate into personalty whether the order is acted upon or not: *Arnold* v. *Dixon* (4); *Steed* v. *Preece* (5); *In re Dodson* (6); *Burgess* v. *Booth* (7); *Fauntleroy* v. *Beebe* (3); *Herbert* v. *Herbert* (8). There is no distinction in principle between an order for sale made in an administration or partition suit, and an order for sale in a Land Judge's matter. This was recognized in *Stinson's Estate* (1), which followed the English authorities. In the present case it was the heir-at-law who got the petition dismissed. The owner in his lifetime might have had the petition dismissed and thereby worked a reconversion, but the heir-at-law is a mere volunteer and cannot alter the facts as fixed at the time of the owner's death.

Cur. adv. vult.

June 12.

Ross, J.:—

The question in dispute arises in the following way:—An absolute order has been made in the Land Judge's Court on the petition of a mortgagee for the sale of the real estate comprised in the mortgage, for the purpose of discharging incumbrances. A sufficient portion of the lands has been sold to discharge all incumbrances. The rest of the lands have not yet been sold. Since the absolute order was made, the owner has died intestate. On the application of his heir-at-law the petition has been dismissed. The question is, whether the unsold lands have been converted by the

(1) [1910] 1 I. R. 13.
(2) 25 Ch. D. 735.
(3) [1911] 2 Ch. 257.
(4) L. R. 19 Eq. 113.
(5) L. R. 18 Eq. 192.
(6) [1908] 2 Ch. 638.
(7) [1908] 2 Ch. 648.
(8) [1912] 2 Ch. 268.

Ross, J. 1914.

SHEANE v. FETHERSTON-HAUGH.

absolute order into personalty, or whether they remain real estate and devolve upon the heir-at-law.

The decision of the Court of Appeal, affirming my decision, in *Stinson's Estate* (1), establishes this, that where more property has been actually sold than is necessary to pay off the incumbrances, there is no equity for reconversion of the money into land in favour of the heir-at-law as against the next-of-kin, inasmuch as both are volunteers. The residue remains money unaffected by any trust or equity, and it must go as personalty to the next-of-kin.

I do not desire to discuss the cases which I have already considered in my judgment in *Stinson's Estate* (1). Since the appeal from that decision the point has turned up again twice in England, in *Fauntleroy* v. *Beebe* (2), and *Herbert* v. *Herbert* (3); nothing very material to the matter before me has been added.

When an order for sale is made absolute it enures for the benefit of all incumbrancers. Very little is known at the time as to the amount likely to be realized out of the sale of the estate. Very little is known as to the relative values of different parts of the estate. Nothing certain can be known as to the amount and number of the incumbrances. Accordingly, the usual order is made for the sale of all the premises mentioned in the petition for the purpose of paying off incumbrances. As I have said in *Swanton's Estate* (4), "The effect of the absolute order in working a conversion is to be measured by its potentiality." Therefore, because only so much of the land is to be sold as is required for the discharge of incumbrances, no valid order can be deemed to exist for the sale of the remainder. As soon as sufficient is sold to discharge incumbrances, the absolute order is dead. It can never become operative in respect of the unsold lands. As put by Palles, C.B., in *Owen's Estate* (5), it would be against right that the Court should sell more of the estate than is necessary to discharge incumbrances.

The result of the whole matter is that there has never been a

(1) [1910] 1 I. R. 13.
(2) [1911] 2 Ch. 257.
(3) [1912] 2 Ch. 268.
(4) [1898] 1 I. R. 157.
(5) [1897] 1 I. R. 200.

valid order for the sale of all the lands, but only of an undetermined part of the lands sufficient in value to discharge the incumbrances.

Ross, J.
1914.

SHEANE
v.
FETHERSTONHAUGH.

This gets the case clear of the decision in *Stinson's Estate* (1), which certainly is not a decision that ought to be extended in its operation.

When proceedings are taken for a particular purpose, and when a sale is ordered to give the relief sought, it is certainly a serious matter that the course of devolution of what remains of the property should be altered in a way that affects the rights of persons not before the Court.

For the reasons I have stated, I hold that the unsold residue of the realty is to go to the heir-at-law.

Solicitors for the plaintiff: *Lett & Fetherstonhaugh.*
Solicitor for defendant: *Horace Turpin.*

D. M. S.

IN RE HUTCHINSON'S TRUSTS.

M. R.
1913.
Nov. 18.
1914.
Jan. 14.

(1913. No. 555.)

Charity—Dissenting Protestants—Unitarians—Dissenters' Chapels Act, 1844 (7 & 8 *Vict. c.* 45)—"*Congregation*"—*Meaning of.*

An annuity of £15 (Irish) charged on land was granted, by deed made in 1761, to trustees, on trust to pay it to the Rev. J. P., or such other person as for the time being should have the pastoral care of the congregation of Dissenting Protestants of the town of Clonmel, for or towards the support of such pastor.

The congregation of Dissenting Protestants of which the Rev. J. P. was pastor were Presbyterians, and had a church in Nelson Street, Clonmel. A subsequent minister adopted Unitarian doctrines, and in 1827 the majority of the congregation seceded and built a church of their own in Clonmel, which was carried on in connexion with the General Assembly of the Presbyterian Church in Ireland. The rest of the congregation continued to attend the church in Nelson Street, in which thenceforth Unitarian doctrines were preached. The Unitarian congregation of Clonmel was one of the three congregations, viz., Dublin, Cork, and Clonmel, forming the Synod of Munster. The annuity was paid to the Unitarian minister for the time being of the

(1) [1910] 1 I. R. 13.

M. R. 1913.

In re Hutchinson's Trusts.

church without question. There was a resident minister down to 1882, after which date the services were conducted by visiting ministers. In 1911 the land on which the annuity was charged was sold under the Purchase of Land (Ireland) Acts; the annuity was redeemed, and the redemption price paid into the Court of the Irish Land Commission. A claim was then made to the redemption price on behalf of the Presbyterian congregation in Clonmel. The only persons then attending service in the Nelson Street church were three members of the family of the late resident minister, and one other person.

Held, that inasmuch as no particular religious doctrines were required by the deed of trust to be taught, the provisions of the Dissenters' Chapels Act, 1844, applied, and that the usage for twenty-five years and upwards preceding the claim was conclusive evidence that Unitarian doctrines and mode of worship might properly be taught and observed in the church, and that the right of the minister to the annuity could not be called in question; (2) that there still was a congregation of Unitarians attending the church; and (3) that the trust fund should be paid over to the Commissioners of Charitable Donations and Bequests, and the income paid to the minister for the time being of the Unitarian congregation in Clonmel.

Adjourned Summons.

This was an application on behalf of Richard Bagwell, of Marlfield in the county of Tipperary, and the Rev. Robert John Orr, of Airmount, Clonmel, in the same county, for the determination of the following question:—Whether the annuity of £15 (Irish currency), granted by an indenture dated the 27th November, 1747, made between Richard Hutchinson of the one part and Matthew Jacob and John Bagwell of the other part, on the trusts thereby declared, or the redemption price thereof of £380 19*s.* 2*d.*, as fixed by order of the Irish Land Commission, dated the 27th April, 1911, should be secured for the benefit of the said Robert John Orr or others his successors for the time being occupying the position of minister of the congregation of Nelson Street, Clonmel, or that the same should be secured for the benefit of the Rev. Robert Rentoul or others his successors for the time being acting as minister of the Presbyterian church in the town of Clonmel.

The following statement of fact is taken from the judgment of the Master of the Rolls:—

"This annuity was created by an indenture, dated the 27th November, 1747, whereby Richard Hutchinson granted to

Matthew Jacob and John Bagwell, their executors, administrators, and assigns, an annuity or yearly rentcharge of £15, to be received, taken, and issuing out of the lands of Knocklofty situate in the Barony of Iffa and Offa in the county of Tipperary for the term of 999 years.

"Almost contemporaneously with, but before, the grant of this annuity, John Perry, by an indenture dated the 15th October, 1747, demised to the said Matthew Jacob and John Bagwell a parcel of ground in the town of Clonmel for the term of 999 years at a peppercorn rent.

"There were no trusts originally declared concerning the annuity or the land demised, but it appears from subsequent documents that Matthew Jacob and John Bagwell were really trustees in the matter.

"The title to the annuity and land devolved by conveyance on Matthew Jacob, William Ryall, John Bagwell, and Samuel Perry, and by a deed poll, dated 14th October, 1761, these parties declared that the annuity had been assigned to them upon trust to pay the same to the Rev. John Patton, or such other person as for the time being should have the pastoral care of the congregation of Dissenting Protestants of the town of Clonmel, for or towards the support of such pastor, and that the land and the house then erected thereon should be held upon trust for the residence of the said John Patton and of such other person or persons as should from time to time thereafter be pastor or pastors of the said congregation.

"The history of the congregation is as follows:—

"The congregation of Dissenting Protestants of whom the Rev. John Patton was the pastor were Presbyterians, but he appears to have been succeeded in the ministry by a clergyman who either always professed, or subsequently adopted, the Unitarian doctrine. He appears to have preached this doctrine to his congregation, with the result that in 1827 a considerable number—stated to be the majority—seceded, and established a church of their own which has since been carried on in connection with the General Assembly of the Presbyterian Church in Ireland. The remaining members of the congregation continued to attend the services held

M. R. 1913.

In re Hutchinson's Trusts.

in the original church, which from 1827 has been a Unitarian church.

"The seceding Presbyterians made no claim to the annuity of £15 Irish, or to the plot of ground which was given to provide a residence for the Rev. John Patton and his successors. The Unitarian congregation and their ministers in succession were thenceforth allowed to remain in undisputed enjoyment of both properties and the original church. The seceding Presbyterian congregation in fact abandoned all claim to them.

"Such is the history of the actual enjoyment of the endowment. The legal title had been kept up by the appointment of new trustees from time to time. The last appointment by deed seems to have been in the year 1816, and there was no further appointment until an application was made to this Court in the year 1877 under the 52nd Geo. 3, c. 101. By an order made in that matter, dated the 13th June, 1877, four gentlemen were appointed new trustees of the property, which, it was ordered, should be vested in them upon the trusts then subsisting.

"These new trustees, and the survivors of them, thenceforth continued to hold the property for the benefit of the Unitarian minister and congregation, and no question was raised until the annuity was redeemed in the year 1911, and the price of the redemption was paid into Court."

The following additional facts appeared from the affidavits filed in the matter:—

The Rev. James Orr (father of the applicant the Rev. John Orr) was the last resident Unitarian minister of the church in Nelson Street. He died in 1882. After that date the services in the church were held by different ministers, called "supply ministers." It was admitted that up to that date there was a congregation attending the church, but the existence of a congregation after that date was denied, and affidavits were made by Mr. Rentoul that in 1911, and since, there was no "congregation," and that the only persons who attended the church when services were held were three Misses Orr, sisters of the Rev. John Orr, except on rare occasions when casual visitors attended. On the other hand, affidavits were made by the Rev. John Orr that

services were regularly held by himself and other visiting ministers, and that there was at the present time a congregation consisting of his three sisters, himself when residing in Clonmel, and a Mr. Canning, who was a chauffeur and driving instructor at a motor garage in the town.

A book was produced in which the Unitarian congregation in Clonmel was returned as one of the three congregations which form the Synod of Munster. These three are Dublin, Cork, Clonmel; and a meeting of the Synod is held alternately in each of these places.

R. D. Murray, for the applicants :—

It must be admitted that Unitarians do not come within the words of the deed of the 14th October, 1761, "Dissenting Protestants" : *Attorney-General* v. *Drummond* (1), affirmed in the House of Lords in *Drummond* v. *Attorney-General* (2). Sir Edward Sugden there decided that Unitarians were not Protestant Dissenters within the terms of the trusts of a deed of 1710, which had for its objects—1, to support the Protes tant Dissenting interest against unreasonable persecutions; 2, the education of youth designed for the ministry among Protestant Dissenters; and 3, to assist poor Protestant Dissenting congregations. The information in that case was filed in 1840, and the case was heard in 1842. The defendants the Rev. Mr. Drummond, Rev. Mr. Hutton, and Dr. Ledlie, were ministers of Presbyterian congregations in Dublin, in Eustace Street and Strand Street, who taught and preached Unitarian doctrines. It appears from the judgment of Sir Edward Sugden that in 1710 there were no Protestant Dissenting congregations then existing, except those who professed a belief in Trinitarian doctrine, and that there was not a trace of a single Protestant congregation which entertained Unitarian opinions. I rely, however, on the statute which got rid of the decision in *Attorney-General* v. *Drummond* (1), viz., 7 & 8 Vict. c. 45, the Dissenters' Chapels Act, 1844, commonly called Lord Lyndhurst's Act. Section 2 of that Act provides that "So far as no particular religious doctrines or opinions,

(1) 1 Dr. & W. 353. (2) 2 H. L. C. 837.

M. R. 1913.

In re HUTCHINSON'S TRUSTS.

or mode of regulating worship, shall on the face of the will, deed, or other instrument declaring the trusts of any meeting-house for the worship of God by persons dissenting as aforesaid, either in express terms, or by reference to some book or other document as containing such doctrines or opinions, or mode of regulating worship, be required to be taught or observed or be forbidden to be taught or observed therein, the usage for twenty-five years immediately preceding any suit relating to such meeting-house of the congregation frequenting the same shall be taken as conclusive evidence that such religious doctrines or opinions or mode of worship as have for such period been taught or observed in such meeting-house may properly be taught or observed in such meeting-house, and the right or title of the congregation to hold such meeting-house, together with any burial ground, Sunday or day school, or minister's house attached thereto; and any fund for the benefit of such congregation, or of the minister or other officer of such congregation, or of the widow of any such minister, shall not be called in question on account of the doctrines or opinions or mode of worship so taught or observed in such meeting-house. Provided nevertheless, that where any such minister's house, school, or fund, as aforesaid shall be given or created by any will, deed, or other instrument, which shall declare in express terms, or by such reference as aforesaid, the particular religious doctrines or opinions for the promotion of which such minister's house, school, or fund is intended, then and in every such case such minister's house, school, or fund shall be applied to the promoting of the doctrines or opinions so specified, any usage of the congregation to the contrary notwithstanding." The effect of this Act, as stated by Sir Edward Sugden in *Attorney-General* v. *Hutton* (1), was to substitute twenty-five years' usage as a sort of statute of limitation for those cases to which the Act applied. The Rev. Mr. Drummond, one of the defendants in *Attorney-General* v. *Drummond* (2), was the minister of the Strand Street Presbyterian Church, and in 1842, another information was filed against the Rev. Mr. Hutton, the minister of the Presbyterian

(1) Drury, temp. Sugden, 480 at p. 505; 7 I. E. R. 612 at p. 619.

(2) 1 Dr. & W. 353.

church in Eustace Street, who was one of the defendants in *Attorney-General* v. *Drummond* (1), and others, to prevent the funds intended for Protestant Dissenting congregations, and for the support of a gospel minister of the Presbyterian persuasion, being applied for the benefit of the defendants, who had adopted Unitarian opinions. Previous to the judgment of the Court being delivered in 1844 by Sir Edward Sugden, the statute 7 & 8 Vict. c. 45 had passed, and section 3 of that Act made it applicable to pending suits by information in which no decree had been pronounced, and authorized the defendants in such suits to apply to the Court, and the Court to give to the defendants the benefit of the Act, if satisfied that the suit was within the operation of the Act. Upon an application in the suit pursuant to this section the information was dismissed, Sir Edward Sugden being of opinion that the case did not come within the exception in the second section, as the particular doctrines to be taught were not specified on the face of the instrument: *Attorney-General* v. *Hutton* (2).

It must be admitted that from 1827 down to the present time Unitarian doctrines have been preached in this church in Nelson Street, Clonmel, and that the Act applies.

But it is said that there is now no congregation attending this church. The affidavits, however, show that there was a resident minister, the Rev. James Orr, down to the year 1882, and that after that time services have been held by visiting ministers, and that there is a congregation of five persons. Also the Unitarian congregation in Clonmel is returned as one of the three congregations which form the Synod of Munster. These three are Dublin, Cork, and Clonmel, and a meeting of the Synod is held alternatively in each of these places. Even if the congregation ceased to exist, which is not admitted, it would be a case for carrying out the deed *cy près*.

Bowen (with him, *Wylie*), for the Rev. R. W. Rentoul, the Presbyterian minister at Clonmel:—

We admit that the Act would apply if it were shown that there was a bona fide Unitarian congregation for twenty-five years

(1) 1 Dr. & W. 353.

(2) Drury, temp. Sugden, 480; 7 I. E. R. 612.

M. R. 1913.

In re HUTCHINSON'S TRUSTS.

prior to the date of this application, but we submit that there was not.

It is not disputed that there was a congregation down to the death of the Rev. James Orr, in 1882, but it is not admitted that there was one afterwards. The affidavits show that the only persons regularly attending the church were three ladies, the daughters of the Rev. James Orr, and one family cannot constitute a congregation.

We contend, therefore, that the Act does not apply, and we rely on *Attorney-General* v. *Drummond* (1); *Attorney-General* v. *Pearson* (2); *Foley* v. *Wontner* (3); *Dill* v. *Watson* (4); *Shore* v. *Wilson* (5), in the House of Lords. The statement of the law in *Craigdallie* v. *Aikman* (6) is cited with approval by Lord Halsbury in *Free Church of Scotland* v. *Overtoun* (7). The decision of Malins, V.-C., in *Attorney-General* v. *Bunce* (8) is apparently against our contention. It was held there that the use of the term "Presbyterian" did not imply that any particular religious doctrines or mode of worship should be taught or observed. But this case was really decided on the ground that ever since 1803 (the year of the last of the title-deeds there in question), the Chapel at Devizes had been mainly occupied by the Baptists, who had for many years before that date been recognized as a religious body distinct from the Presbyterians. Moreover, it appeared in that case that the Presbyterian congregation, who disputed the ownership of the several funds in question with the Baptists, was not a bona fide one, but had been established by certain Presbyterians (most of whom resided in Southampton) for the express purpose of laying the information in the case.

In the present case the whole history of the Presbyterian body in Ireland, as set out in the *Attorney-General* v. *Drummond* (1) and *Attorney-General* v. *Hutton* (9), shows that that body was definitely Trinitarian (see especially the detailed account of the prosecution of Rev. Mr. Emlyn, as set out in the judgment of Sir Edward Sugden

(1) 1 Dr. & W. 353; 2 H. L. C. 837.
(2) 3 Merivale, 353
(3) 2 Jac. & W. 245.
(4) 2 Jones, 48.
(5) 9 Cl. & F. 355.
(6) 1 Dow, 1.
(7) [1904] A. C. 613.
(8) L. R. 6 Eq. 563.
(9) Drury, temp. Sugden, 480.

in *Drummond's Case* (1); and in *Hutton's Case* (2) it is clear that the Lord Chancellor would have followed his previous decision in *Attorney-General* v. *Drummond* (1) (afterwards affirmed by the House of Lords) (3), if the Dissenters' Chapels Act, 1844, had not become law in the meantime.

Even if the Unitarian Body had become entitled to the fund by long-continued user prior to 1882, the trusts for their benefit must determine with the failure of their "congregation."

Murray, in reply:—

I do not ask that the money be paid over to the Unitarians, but only that it be secured for the minister of their congregation, so long as there is a congregation. If there should cease to be a congregation, application can be made to the Court. There is a congregation at present, though there are only a few worshippers.

There is nothing in the regulations of the Unitarian Church as to what constitutes a congregation. [He referred to books recording the holding of services in the church, and the number of the congregation from time to time.]

Cur. adv. vult.

1914.

Jan. 14.

O'CONNOR, M.R.:—

The question which has been submitted for the decision of the Court is concerned with the sum of £380 15*s.* 2*d.*, which is standing on deposit receipt in the Court of the Irish Land Commission to the credit of the estate of the Earl of Donoughmore, which has been lately sold under the Land Purchase Acts, and the separate credit of the redemption-price of an annuity of £15 Irish, which had been charged on a portion of the estate.

[The Master of the Rolls, having stated the facts of the case as above set out, proceeded as follows:—]

After a long lapse of time of uninterrupted and exclusive enjoyment it is certainly startling to hear a claim now made by a congregation who are the successors of a seceding congregation who had set up an independent church and abandoned all claims, if any, which they had as members of the congregation which they

(1) 1 Dr. & W. 353

(2) Drury, temp. Sugden, 480, see p. 526.

(3) 2 H. L. C. 837, *sub nom.* *Drummond* v. *Attorney-General.*

M. R. 1914.

In re HUTCHINSON'S TRUSTS.

left. The claim, however, has been made, and it deserves serious consideration.

Mr. Bowen, counsel for the congregation of the existing Presbyterian Church in Clonmel, contended that it was the duty of the Court in determining the proper trusts affecting the fund which now represents the endowment, to ascertain the intentions of the founders, and that if these intentions were violated in the administration of the trust, there was a breach of trust for which there was a remedy no matter how long the lapse of time. The well-known case of *Shore* v. *Wilson* (1) (commonly called *Lady Hewley's Case*) was relied upon for this proposition, which, of course, cannot be gainsaid, although I hope later on to show its inapplicability to the present case.

In *Shore* v. *Wilson* (1) it was established to the satisfaction of the Court that "the poor and godly preachers of Christ's Holy Gospel," who were the objects of Lady Hewley's charity, were not intended by her to include persons who denied the divinity of Christ, and it was declared that Unitarians were not entitled to participate in the charity. But in the present case I have no evidence that the founders of the charity had any aversion to Unitarian doctrine. The trust as declared was for the congregation of the Dissenting Protestants of the town of Clonmel. There is no special creed indicated by the description "Dissenting Protestants," a class wide enough to include Presbyterians, Congregationalists, Baptists, Unitarians, and others. There is no evidence as to the particular phase of Protestant dissent which was favoured by the founders, except that which is to be inferred from the fact that the congregation of dissenting Protestants as it existed in Clonmel at the date of the declaration of trust was a Presbyterian congregation. But it does not follow that the founders of the charity intended to exclude from the congregation for whose benefit the endowment was given all persons who refused to accept the doctrine of the Trinity. The judgment of Sir R. Malins, V.-C., in *Attorney-General* v. *Bunce* (2) shows that many congregations of Independents, Baptists, and not a few Unitarians, were originally Presbyterians, and that they frequently retained their original name of Presbyterians, and

(1) 9 Cl. & F. 355. (2) L. R. 6 Eq. 563.

he quotes, at p. 574, from Murch's History of the Presbyterian and General Baptist Churches in the West of England the following passage :—" For upwards of a century and a half the term *English Presbyterian* has not signified the Christian who, in religious matters, is governed by a Synod, and believes the doctrine of the Trinity, the atonement, and original sin." How, then, can I conclude that, because the congregation of Protestant Dissenters in Clonmel were in the year 1747 known as a Presbyterian congregation, the founders of the charity intended it exclusively for people who would probably call themselves orthodox Presbyterians, believing in the Trinity ? There is no such cogent evidence here as there was in *Lady Hewley's Case* (1).

But really I am relieved from any inquiry as to what in fact were the intentions of the pious founders. The decision in *Lady Hewley's Case* (1) involved many dissenting congregations in difficulties, because in many dissenting chapels religious services were held or doctrines preached which were not in accordance with the intentions of the persons who founded and endowed them. In relief of all such congregations the Dissenters' Chapels Act, 1844 (7 & 8 Vict. c. 45), commonly called Lord Lyndhurst's Act, was passed. By sect. 2 of this Act it is provided that so far as no particular religious doctrines or opinions, or mode of regulating worship, appear in the will, deed, or other instrument creating the trust, the usage for twenty-five years immediately preceding any suit relating thereto shall be taken as conclusive evidence that such religious doctrines or opinions or mode of worship as have for that period been taught or observed in any meeting-house may properly be taught or observed therein, and the right or title of any congregation to hold such meeting-house and any fund for the benefit of such congregation or minister, or other officer of such congregation, shall not be called in question on account of the doctrines or mode of worship so taught or observed.

I think that the deed of the 14th October, 1761, which first declared the trust affecting the annuity, may be held to be the deed creating the trust within the meaning of the section. This deed certainly does not mention any particular religious doctrine,

(1) 9 Cl. & F. 355.

M. R. 1914.

In re Hutchinson's Trusts.

or opinions, or mode of regulating worship, and therefore the usage for the last twenty-five years is, under the statute, conclusive evidence that Unitarian doctrine and mode of worship may be properly taught and observed in the chapel of which the Reverend John Patton was formerly the minister, or, in other words, the usage has been in accordance with the trust affecting the endowment.

One other point was made on behalf of the Presbyterian congregation who now claim the fund. It is alleged that the trust has failed so far as it might have been applied for the benefit of Unitarians, because there is no congregation for the Unitarian church in Clonmel. The evidence as to this is that the Unitarian population of Clonmel has practically ceased to exist, and that the Unitarians have dwindled down to three old ladies, sisters, who are the daughters of a former Unitarian minister, and members of one family, and a Mr. Canning; that there is no resident pastor; and that the church is served by ministers from other districts. It was contended that the three ladies and one other person do not constitute a congregation. It is no doubt a small congregation, but I am unaware of any authority which makes a large multitude of persons essential to the constitution of a congregation. There is authority the other way. In *Barnes* v. *Shore* (1) articles were exhibited against an ordained minister of the Church of England for having offended against the laws ecclesiastical by publicly reading prayers in an unconsecrated chapel without any licence or authority for so doing. It was alleged by way of defence that there was not sufficient proof that there was a congregation present or that the reading was in public. Commenting on this, Sir Herbert Jenner Fust, President of the Court of Arches, said:—"What is necessary to constitute a congregation has not been very strictly defined; but it has been commonly considered that 'where two or three are gathered together' there is a sufficient number to constitute a congregation." The minister was found guilty of the offence charged. In *Freeland* v. *Neale* (2) in a similar case the same learned judge said:—"In *Barnes* v. *Shore* (1) I said, what I now repeat, that

(1) 1 Robertson's Ecc. Cases, 382. (2) *Ibid.* p. 643.

where two or three are gathered together, who do not strictly form a part of a family, there is a congregation." In the present case there is a congregation of three or four, no doubt a very small one, but this is nothing new in the history of churches. It is well known that in the time of the late Established Church in Ireland there were many congregations of very small numbers indeed. I must hold that there is still a congregation of Unitarians in Clonmel, and that the trust has not so far failed. I am, however, far from saying that even if this particular trust has failed, the Presbyterian congregation has any claims to the property.

I am not satisfied on the evidence that the Rev. Robert John Orr has the sole pastoral care of the Unitarian congregation. The evidence rather goes to show that the pastoral care has been committed to what are known as supply ministers, who are deputed from other districts to hold services in Clonmel. I think that each minister so deputed has for the time the pastoral care of the Unitarian congregation, and that the annuity should, if there be more ministers than one who do such supply duty, be allocated amongst them according to the services rendered.

I think that in future the proper custodians of the trust fund will be the Commissioners of Charitable Donations and Bequests, and I will direct steps to be taken to have the fund transferred to them.

I will not now go into details as to how the trust is to be administered, because the only question before me is the broad one whether the Unitarian or the Presbyterian congregation in Clonmel is entitled to the benefit of it. If the commissioners have any difficulty in the administration, they may apply to the Court for directions.

In answer to the question which has been put, I will declare that the sum of £380 15*s.* 2*d.* now standing on deposit receipt in the Court of the Irish Land Commission to the credit of the estate of the Earl of Donoughmore, and the separate credit of the redemption-price of the annuity of £15, Irish, &c., and all interest on said sum, is held upon trust to pay to the person who shall, for the time being, have the pastoral care of the congregation of Dissenting Protestants of the town of Clonmel, who attend the services held in

M. R. 1914.

In re Hutchinson's Trusts.

the Unitarian Church in said town, an annuity of £15, late Irish currency, or such lesser annual sum as the investments from time to time of the said sum shall produce, after providing for the costs hereinafter awarded. I will further declare that Richard Bagwell and the Reverend Robert John Orr, the surviving trustees appointed by the order dated the 13th June, 1877, are entitled to their costs to be taxed as trustees' costs out of the trust funds, to be paid in the first instance out of the accumulation of interest which has accrued on the capital sum, and in the next place out of such capital sum; the said trustees to be at liberty to apply to the Irish Land Commission to pay the said capital sum and the accumulated interest to the Commissioners of Charitable Donations and Bequests, who on receiving such payment shall be at liberty to pay thereout the said costs and also the costs of the said application to the Irish Land Commission when taxed, and shall invest the balance in authorized securities, and pay the income so far as the same shall extend towards payment of an annuity of the equivalent of £15, late Irish currency, to the pastor for the time being of the congregation of Dissenting Protestants who attend at the services of the Unitarian Church in Clonmel.

I have advisedly omitted all mention of the Reverend Mr. Rentoul's costs. The claim made by him is of a very stale character, and he made it at his own risk.

Solicitors for the applicant: *Maxwell, Weldon, & Co.*
Solicitors for Rev. R. W. Rentoul: *Mackenzie & Skehan.*

W. L.

IN THE MATTER OF THE ESTATE OF FRANCES CECILIA ARCHER.

Wylie, J.
1914.
June 15, 18.

Mortgage—Successive charges on both or one of two funds—Deficiency of funds—Notice—Marshalling.

B. was entitled to a first charge on two funds "A" and "B" appearing on the final schedule of incumbrances affecting the purchase-money of lands sold under the Land Purchase Acts. C. was entitled to a second charge on fund "B" only. B. subsequently took a further charge on funds "A" and "B"; and after that L. acquired a charge on fund "A" only. Each had notice of all the prior charges. It appeared that if B.'s first charge were paid rateably out of both funds, the residue of fund "B" would be insufficient to pay C.'s second charge in full.

Held, that C. was entitled to marshal B.'s first charge, and to have so much of it paid out of fund "A" as would leave sufficient of fund "B" to pay his own second charge in full, notwithstanding the fact that L.'s puisne charge would be thereby prejudiced.

QUESTION arising on the ruling of the Final Schedule of Incumbrances.

The vendor was entitled as tenant for life to the estate sold in this matter under the Land Purchase Acts. The proceedings for sale were commenced in 1908. By indenture dated the 22nd October, 1910, the vendor, and Arthur M. Archer, her husband, assigned to Henry Y. Barker, and George H. Rogerson, first, the sum payable at claim "A" on the final schedule, *i.e.* the sum equivalent to arrears of rent payable under sect. 24, sub-s. 8, of the Irish Land Act, 1903, and, secondly, the bonus, to secure repayment of £350, with interest. The amount vouched as due on foot thereof was £411 19*s.* 8*d.*

By indenture dated the 22nd March, 1911, the vendor and the said Arthur M. Archer assigned to James Cooper the bonus only, to secure repayment of £1350 and interest. The amount vouched as due on foot thereof was £1562 11*s.* 11*d.*

By indenture dated the 27th April, 1912, the vendor and the said Arthur M. Archer further charged the premises comprised

Wylie, J. 1914.

In re Archer's Estate.

in the said mortgage of the 22nd October, 1910, with repayment to the said Henry Y. Barker and George H. Rogerson of £200 and interest. The amount vouched as due on foot thereof was £221 5*s.* 10*d.*

By indenture, dated the 20th January, 1914, the vendor charged all her interest in the sum payable at claim "A" on the final schedule with repayment to Mary La Touche of any sum she might be called upon to pay on foot of a guarantee given by her to the Hibernian Bank. The amount due on foot thereof was not yet ascertained. In each case the vendor was expressed to convey as "beneficial owner."

In the Land Commission register of charges on the bonus, the deeds of the 22nd October, 1910, and the 27th April, 1912, were entered as affecting the purchase-money and bonus; the deed of 22nd March, 1911, was entered as affecting the bonus; and the deed of the 20th January, 1914, as affecting the sum payable under sect. 24, sub-s. 8, of the Act of 1903.

The sum available for payment at claim "A" on the final schedule was £625 14*s.* 6*d.* The bonus amounted to £1,689 9*s.* 7*d.* It appeared that if the amount due on foot of the mortgage of the 22nd October, 1910, were paid rateably out of the sum available for payment at claim "A" and the bonus, the residue of the bonus would be insufficient to pay the claim in full of James Cooper under the mortgage of 22nd March, 1911. The question of the right of the latter to marshal accordingly arose.

A. K. Overend, for Miss La Touche :—

The first mortgage of the 22nd October, 1910, should be paid rateably out of the sum payable at claim A. on the final schedule, and the bonus. The second mortgagee will not be allowed to marshal the securities in the prior mortgage by throwing the amount thereby secured on the sum payable at claim "A," where the result will be to prejudice the rights of the puisne mortgagee, whose only security is this fund: see *Barnes* v. *Racster* (1); *Bugden* v. *Begnold* (2). Miss La Touche had no notice of any charge affecting the sum payable at claim "A." She only had notice of charges affecting the purchase-money and bonus.

(1) 1 Y. & C. C. C. 401. (2) 2 Y. & C. C. C. 377.

[*Wylie, J.* :—The sum payable at claim "A" is portion of the purchase-money, and notice of a charge on the latter would amount to notice that the charge affected the former.]

Even assuming that Miss La Touche was fixed with notice, the proposition is equally applicable, inasmuch as her rights as puisne mortgagee will be prejudicially affected if the second mortgagee is allowed to marshal.

A. W. Samuels, K.C., for James Cooper :—

Cooper is entitled to marshal the prior mortgage by throwing it on claim "A" so as to leave sufficient of the bonus to pay himself in full. Miss La Touche was a surety only; as such she has no right to prevent a prior mortgagee from marshalling until she has paid the debt of the mortgagor for which she was surety: *South* v. *Bloxham* (1). This has not occurred.

The proposition that a third incumbrancer can prevent marshalling in favour of a second incumbrancer is stated too widely. The facts of *Barnes* v. *Racster* (2) are distinguishable from the facts here. The Vice-Chancellor in that case specially guarded himself against deciding what would be the effect in circumstances such as exist here. In that case the security of the first incumbrancer only extended to one property, and no right to marshal originally existed in favour of the second incumbrancer whose security was on the same property. The first incumbrancer subsequently got a mortgage on another property in which the second incumbrancer had no interest. The fourth incumbrancer subsequently obtained that property, together with the other property, as his security. This case is explained in *Flint* v. *Howard* (3). Here the fourth incumbrancer had full notice of the prior mortgages. In *Bugden* v. *Begnold* (4), it is distinctly pointed out that there was no notice to the third incumbrancer of the second incumbrancer's mortgage, either constructively or otherwise. The Irish cases are clear on the point that notice will prevent the application of the general proposition that a third incumbrancer can prevent a second

(1) 2 H. & M. 457.
(2) 1 Y. & C. C. C. 401.
(3) [1893] 2 Ch. 54.
(4) 2 Y. & C. C. C. 377.

Wylie, J. 1914. *In re* ARCHER'S ESTATE.

incumbrancer from marshalling. See *In re Roddy's Estate* (1); *In re Scott's Estate* (2); *In re Roche's Estate* (3). See also *Mutual Life Assurance Society* v. *Langley* (4). The mortgage to Cooper was made by the mortgagor "as beneficial owner." The implied covenants against incumbrances, for quiet enjoyment, and for further assurance give to the second incumbrancer a right of exoneration against the double creditor's mortgage, and the puisne incumbrancer cannot prevent the second incumbrancer from marshalling. [He also referred to *Averall* v. *Wade* (5); *Colyer* v. *Finch* (6); *Hughes* v. *Williams* (7); *Tighe* v. *Dolphin* (8); *Re Jones*; *Farrington* v. *Forrester* (9); Lord Halsbury's Laws of England, vol. xxi, sects. 305, 306.]

Overend, in reply :—

In *South* v. *Bloxham* (10) the surety originally had no security, and the case is distinguishable on that ground. The proposition that the second mortgagee cannot lose his right to marshal when his mortgage contains the usual implied covenants against incumbrances, for quiet enjoyment, and for further assurance, does not apply where he has notice of the prior mortgage.

Cur. adv. vult.

June 18.

WYLIE, J. :—

A question as to the application of the law of marshalling has been raised in respect of mortgages upon two separate funds awaiting distribution. The first fund, amounting to £625 14*s.* 6*d.*, is known as "A" on the Final Schedule. The second fund is the bonus, amounting to £1,689 9*s.* 7*d.*, which I shall call "B." The relative position of the several mortgages is as follows :—Barker has a first mortgage on both "A" and "B." Then Cooper has a second mortgage on "B" only. Afterwards Barker took a further mortgage on both "A" and "B." Then Miss La Touche got a mortgage on "A" only. Each of the mortgagees had notice of all prior mortgages.

(1) 11 Ir. Ch. R. 369.
(2) 14 Ir. Ch. R. 63.
(3) 25 L. R. Ir. 278.
(4) 32 Ch. D. 460.
(5) Ll. & G. *temp.* Sugden, 252.
(6) 5 H. L. C. 922.
(7) 3 Mac. & G. 683.
(8) [1906] 1 I. R. 305.
(9) [1893] 2 Ch. 461.
(10) 2 H. & M. 457.

Now, Barker, having a first charge on both funds, has a right to be paid in full out of either or both. But if he is paid in the ordinary way rateably out of both, the residue of "B," upon which alone Cooper has the next charge, will not pay Cooper in full. Cooper accordingly claims the right to marshal the first charge by throwing it on "A" so as to leave sufficient of "B" to pay him in full. This would undoubtedly be his right if there were no subsequent charges on either fund. But Miss La Touche contends that this right or equity does not exist as against her subsequent charge on "A" only, even though at the time she took the charge she had notice of all the prior charges.

From a careful reading of the judgments in *Mutual Life Assurance Society* v. *Langley* (1), *Flint* v. *Howard* (2), and *In re Roche's Estate* (3), I think that the law on this point is absolutely clear. What was the right or equity of Cooper at the time Barker took his second mortgage? He clearly had a right to marshal Barker's first mortgage, and the mortgagor could not create a further charge on "A" so as to prejudice that right. Even after Barker got his second charge, Cooper could at any time have redeemed Barker's first charge alone, and claimed an assignment of both securities; and Barker, by virtue of his second charge, would be entitled to redeem Cooper, but on the terms of paying in full not only Cooper's own charge, but the amount Cooper had paid for the redemption of the first mortgage. In the same way, the mortgagor could not by a subsequent mortgage to Miss La Touche affect or prejudice the then existing rights of Cooper and Barker, of which she had notice.

I am relieved from discussing the question as to whether the law would be the same if Miss La Touche had had no notice of any of the prior charges.

It seems to me, therefore, to follow that Cooper has the right to have so much of the first mortgage paid out of "A" as will leave sufficient of "B" to pay him in full.

Solicitors for Miss La Touche: *A. O'Conor & Son.*
Solicitor for James Cooper: *Norris Goddard.*

J. E. W.

(1) 32 Ch. D. 460.
(2) [1893] 2 Ch. 54.
(3) 25 L. R. Ir. 271.

Appeal.
1914.
June 26.

In the MATTER of the ESTATE of CAROLINE F. NASH and Another (1).

Land Purchase Acts—Sale of holding—Advance—Agreement for sale of entire holding—Subsequent division—Separate advances—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), ss. 1, 15.

In 1906 a landlord agreed with his tenants for the sale of his estate, including a holding held subject to a judicial yearly rent of £17 fixed by agreement in 1897, the price agreed on for this holding being £437. No purchase agreement was, however, lodged in the Land Commission at this figure, but the landlord consented to the tenant signing two separate purchase agreements for two separate divisions of the holding at apportioned rents of £10 and £7 respectively, and at the prices of £257 and £180 respectively. These sums the Estates Commissioners refused to advance, they not being satisfied with the security of the separate divisions of the holding. If the original agreement had been carried out, the case would have been within the provisions of sub-s. 1 of sect. 1 of the Irish Land Act, 1903. On the hearing of a question of law submitted by the Estates Commissioners:

Held, by the Court of Appeal (reversing the decision of Wylie, J.), that the divided portions of the holding did not come within the provisions of sub-s. 1 of sect. 1 of the Act of 1903, and that the Estates Commissioners were at liberty to refuse to sanction the advances sought for.

Appeal.

On the 11th February, 1914, a question of law was submitted by the Estates Commissioners to Mr. Justice Wylie, as follows:—

"In the year 1906 agreements were entered into with the tenants for sale of above estate. One of the tenants, Mr. Cairn Cross Templeman, was then tenant of a holding thereon containing 49A. 1R. 3P., held from year to year at the yearly judicial rent of £17, fixed by agreement (second term) dated the 20th April, 1897, and filed in the Land Commission 22nd July, 1897, Record No. 14, and the price agreed on for the whole holding was £437, but no purchase agreement was lodged at this figure. If

(1) In the Court of Appeal, before O'Brien, L.C., and Holmes and Moriarty, L.JJ.

the agreement for the purchase of the said holding for the sum of £437 had been lodged and an advance requested for the whole of this sum, the case would have been within the provisions of sect. 1 of the Irish Land Act, 1903. The said holding was in two separate divisions—one portion containing 33A. 2R. 17P., and the other containing 15A. 2R. 26P. As Mr. Templeman was anxious to dispose of his interest in the holding, and as the holding in the opinion of the landlords and tenant was more marketable when separated, at the tenant's request the landlords consented to his signing a separate purchase agreement for each division at the apportioned rents of £10 for the larger division, and £7 for the smaller one, and the purchase prices were agreed to at sums of £257 and £180 respectively, being at the rate of $25\frac{7}{10}$ and $25\frac{5}{7}$ years' purchase respectively.

"In the year 1911 Mr. Templeman, the tenant, sold his interest in the two holdings, the larger one (containing 33A. 2R. 17P.) to Thomas McHugh for the sum of £242 10s., and the smaller one (containing 15A. 2R. 26P.) to Michael McGoldrick for the sum of £160. As the result of inspection the Commissioners asked the vendors if they would accept advances of £185 for the purchase of Thomas McHugh's holding, and £116 for the purchase of Michael McGoldrick's holding, which the vendors refused, contending that the cases were within the zonal provisions of sect. 1, sub-sect. 1, of the Irish Land Act, 1903, and that the agreed prices were not subject to revision."

The Commissioners at the request of the vendors submitted the following question of law for the opinion of the Judicial Commissioner:—

"Do the said holdings as so agreed to be purchased come within the provisions of sect. 1, sub-sect. 1, of the Irish Land Act, 1903?

The following was the judgment of Mr. Justice Wylie:—

In this case a question of law has been submitted to me by the Estates Commissioners, and the facts are stated in their memorandum as follows:—[His Lordship read the memorandum as set out above.]

Now it is admitted by the Estates Commissioners that if the vendor had lodged with the Land Commission the first agreement

Appeal. 1914. *In re* NASH'S ESTATE.

for the purchase of the entire holding by the tenant for the sum of £437, the case would have been within the zones, and they would have been bound to advance the entire purchase-money, being by sect. 1 not only relieved from the duty of inquiring into the question of security, but prohibited from doing so. The vendor, however, being anxious to oblige the tenant, who wanted to sell his interest to greater advantage in two divisions, agreed with the tenant to sign a separate agreement for each division, on the same terms as the former agreement, the rent and purchase-money being duly apportioned. The Estates Commissioners raise the objection that by reason of the division the holdings in the two separate agreements were no longer holdings subject to a judicial rent within the meaning of sect. 1, and therefore they were at liberty to inspect the lands on the question of security. The Estates Commissioners do not question the fairness of the apportionment of the rent and purchase-money, nor do they suggest that the two holdings are of less value, as security for the advances, than the entire holding for the entire advance, which they would have been bound to make if the holding had not been divided, and, having inspected for security, they offered to advance for the two holdings £301, instead of the £437 at which the tenant agreed to purchase, though in the meantime, as stated in the case, the tenant had sold his interest in the two divisions for £412 10*s.* to two apparently solvent purchasers; that is, that a holding that sold for £412 10*s.*, subject to a purchase annuity of £14 4*s.* 2*d.*, is only security for an annuity of £8 5*s.* 6*d.* Now the position of the parties in this case is a peculiar one. As already stated, if the original agreement for the purchase of the entire holding at £437 had been lodged, the Land Commission would have been bound to advance the whole purchase-money. Again, if the vendor and the original tenant had formally complied with the provisions of sect. 17 of the Act of 1896 by dividing the holding into two tenancies in the same manner as it was divided in the two substituted purchase agreements, and then lodged these two substituted purchase agreements, the cases would have been within sect. 1, and the Estates Commissioners would have been bound to advance the entire £437. And, again, if the vendor had permitted the original tenant to sub-divide his holding

between the two purchasers in the same manner as in the two purchase agreements, and the two purchasers as conjoint tenants had signed an agreement for the purchase of the holding on the same terms as the original tenant, and such agreement had been lodged, the Estates Commissioners would have been bound to advance the whole of the £437, and the purchasing tenants could afterwards have got the holding divided and the annuity apportioned, or the Estates Commissioners could under sect. 15 of the Act of 1903 have made an order for division before the sale was completed, so that in these different ways this transaction could have been carried out without the Estates Commissioners being able to interfere with the rights of the vendor and the purchasers under the original agreement for purchase. Again, if the Estates Commissioners refuse to sanction these two purchase agreements, they become void, and the original judicial tenancy remains unaffected, and the two purchasers from the original tenant can as conjoint tenants, by signing a new agreement for purchase at the same price, compel the Estates Commissioners to make the entire advance applied for, though, as this would be a sale under the Act of 1909, it would be less beneficial both to the vendor and the purchasers, while there would be no better, but in fact a worse, security for the advance than before by reason of the tenant-purchaser having to pay 3½ per cent. In this state of things it does appear to me that, though these two purchase agreements may not be technically within sect. 1, they are entirely within the purpose and equity of the section, and should be dealt with accordingly. I therefore answer the question in the affirmative.

The Treasury and the Land Commission appealed to the Court of Appeal.

The Solicitor-General (*Jonathan Pim, K.C.*), and *M'Afee*, for the Treasury :—

The question of law should be answered in the negative.

Assuming that the holding, if it had remained undivided, would have come within the provisions of sub-s. 1 of s. 1 of the Irish Land Act, 1903, it is clear that this sub-section does

Appeal. 1914.

In re NASH'S ESTATE.

not apply to either of the divided portions of the holding; neither is a holding subject to a judicial rent fixed or agreed to: *M'Carthy* v. *Bennett* (1). The Land Commission may, under sub-s. 2, sanction the advances, but only if they are satisfied with the security, and they are not so satisfied. Wylie, J., suggests that the case might have been brought within the section if some other course had been adopted, but it is submitted that the question of law should be determined on the facts as they exist.

Jellett, K.C., and *W. E. Wylie*, for the Land Commission.

Leech, K.C., for the vendor:—

The case comes within sub-s. 1 of s. 1 of the Act. There was here a holding subject to a judicial rent fixed by agreement since the passing of the Act of 1896. Under sect. 8 of the Land Law (Ireland) Act, 1881, the judicial tenancy continues for a period of fifteen years; it is immaterial that the holding was sub-divided: see sub-s. 4 of s. 15 of the Irish Land Act, 1903, which was enacted to meet such a case as this. The security for the advance is not interfered with; the same lands remain as security, and it is admitted that the apportionment of the purchase-money is fair. In any case, the question is one of procedure only; the same results could have been brought about in one of the modes pointed out by Wylie, J., and the Estates Commissioners should not be permitted to refuse to sanction the advances on what is at most a technical point.

The Solicitor-General was not called upon to reply.

O'BRIEN, L.C.:—

In this case Mr. Justice Wylie was asked by a memorandum of the Estates Commissioners to answer a specific question. What we have to determine on this appeal is whether that question was rightly answered by the learned judge, and I have arrived at the clear conclusion that a different answer should have been given.

(1) [1899] 2 I. R. 622.

The matter is one of procedure only; we are not concerned with any question of abstract justice, or with what might have been the result had a different procedure been adopted, but we must answer the question of the Estates Commissioners on the facts of the case as we find them.

It appears that one of the tenants on this estate was in the year 1906 in the possession of a single holding held under a tenancy from year to year at the yearly judicial rent of £17; and on the occasion of the sale of the estate to the occupying tenants there was an agreement signed for the sale of this holding for the sum of £437. If the sale of the holding had proceeded in the usual way, the case would probably have come within the provisions of sect. 1 of the Act of 1903; but no purchase agreement in respect of the holding, as a single holding, was, in fact, ever lodged. A course different both in form and procedure was adopted. The landlord and tenant agreed to divide the holding into two portions, one containing 33A. 2R. 17P., the other 15A. 2R. 26P., at two rents of £10 and £7 respectively. Two separate purchase agreements were signed in respect of these two portions of the holding, which, as I have said, was at the time held under one judicial rent of £17, and two separate applications were made to the Land Commission for advances in respect of the two portions thus formed. The case is, therefore, freed from any consideration of what the result might have been if an agreement for the purchase of the holding as a whole had been lodged with the Land Commission, and if the sale had proceeded on that basis. What we have to determine is whether, having regard to the two purchase agreements which were executed, and the two applications which were made in respect of these two portions of land, the case did or did not come within the provisions of sect. 1, sub-s. 1, of the Irish Land Act, 1903.

That section is as follows:—"In the case of the sale of an estate . . . when application is made for an advance under the Land Purchase Acts of the whole purchase-money of a holding, and the Land Commission are satisfied that the tenant is in possession of the holding, then, subject to the limitations in the Land Purchase Acts on advances to tenants purchasing their holdings, the Land Commission shall sanction the advance in the

Appeal. 1914.

In re NASH'S ESTATE.

O'Brien, L.C.

following cases, namely:—(*a*) In the case of the purchase of a holding subject to a judicial rent fixed or agreed to since the passing of the Act of 1896, if the purchase annuity created under this Act payable in respect of the advance will be not less than 10 nor more than 30 per cent. below the existing rent." Then follows sub-clause (*b*), which has no application to the present case.

For the purposes of this section, then, there must be not only the sale of an estate, but also an application made for an advance of the whole purchase-money of the holding—admittedly no such application was made here—and further, there must be "a holding subject to a judicial rent fixed or agreed to since the passing of the Act of 1896." How can it be said that either portion of the holding in question is one subject to such a judicial rent? No judicial rent, either of £10 or £7, was ever fixed by an order of the Land Commission, or by agreement filed under the provisions of the Act of 1881; therefore neither portion of the holding is "a holding" which comes within the words of the sub-section which I have quoted.

That simple answer to a simple question would at once dispose of the entire case, but for the reasons given by Mr. Justice Wylie in support of his decision. He was of opinion, I think, that these two purchase agreements were not technically within sub-s. 1 of sect. 1 of the Act, but he considered that they might in equity be considered as coming within the purview of the section, seeing that, if some other procedure had been adopted, the desired result might have been brought about. I consider, however, that the provisions of these statutes, involving as they do the advances of large sums of public money for specific purposes, should be strictly applied, and, in my judgment, if the subject-matter of a particular application for an advance does not fulfil the conditions required by the statute, the application should be refused. It would be dangerous to speculate whether the sale of the two portions of this holding might not have been carried out in a different way, whether under sect. 17 of the Act of 1896, or by the making of one application in respect of the entire holding and of a further application for leave to sub-divide. That is not before us. The question must, as I have said, be determined on the facts as they

exist, and, in my judgment, the question should be answered in the negative. I desire, however, not to be taken as expressing any abstract opinion as to what the result might have been if another procedure had been adopted.

Appeal. 1914. *In re* NASH'S ESTATE. O'Brien, L.C.

HOLMES and MORIARTY, L.JJ., concurred.

Solicitor for the Treasury: *J. F. Donnelly.*
Solicitor for the Land Commission: *Wm. Alexander.*
Solicitors for the Vendor: *Lonsdale & Davies.*

R. ST. J. C.

IN RE BORRISOKANE RURAL DISTRICT COUNCIL; EX PARTE HIGGINBOTHAM AND OTHERS.

Barton, J. 1914. June 15, 23.

Local Government—Labourers Acts—Compulsory acquisition of land—Interest on compensation—Debt payable out of the poor rate—Limited time for payment—Debt not recoverable—Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37), *s.* 51, *sub-s.* 7—*Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70), *Schedule II, Art.* 24.

A rural district council was authorized to acquire a number of plots on a certain estate for the purposes of the Labourers Acts. After the amount of compensation to be paid by the council for these plots had been fixed by arbitration, the council went into possession, the owners not objecting. Difficulties occurred in connexion with the title, and there was considerable delay. Ultimately, on August 1st, 1913, the council lodged in Court the amount of the compensation awarded. On February 10th, 1914, the owners of the estate presented a petition in the Chancery Division asking to have the amount transferred to a certain credit, and also claiming a declaration that they were entitled to interest at 5 per cent. on the amount of compensation awarded, from the date on which the council went into possession till the date of lodgment.

Held, that the claim for interest was a "debt, claim, or demand" which was directly or indirectly payable out of the poor rate, and not having been paid within the half year in which it became due or within three months afterwards, and no legal proceedings having been commenced within that time, it was barred by sect. 51, sub-s. 7, of the Local Government (Ireland) Act, 1898.

Barton, J.
1914.

In re BORRISOKANE RURAL DISTRICT COUNCIL; EX PARTE HIGGINBOTHAM.

PETITION.

The petitioners were the owners of the Clarke estate, portion of which was situate in the Borrisokane rural district. By the Borrisokane Rural District Labourers Order, 1905, the Borrisokane rural district council was authorized to acquire three plots of land on this estate for the purposes of the Labourers (Ireland) Acts. The arbitrator awarded the sum of £56 15*s.* 6*d.* as compensation to the owners of the estate for their interest in the lands by award dated 4th June, 1906. The council went into possession of these plots on the 1st January, 1907, the owners not objecting. By a subsequent Order, viz., the Borrisokane Rural District Labourers Order, 1908, the council was authorized to take seven more plots on this estate, and the arbitrator awarded the owners the sum of £606 10*s.* This award was dated 15th October, 1908. The council went into possession of these plots on 1st April, 1909, the owners not objecting. A difficulty arose about the title, an action being pending in the Chancery Division in England in connexion with the estate, in which a receiver had been appointed. Considerable delay occurred, and ultimately on the 1st August, 1913, the council lodged in Court the total amount of the compensation awarded. On the 10th February, 1914, a summary petition was presented by the owners of the estate under Article 23 of the second schedule of the Housing of the Working Classes Act, 1890, claiming (1) a declaration that the council was liable to pay to the petitioners interest on the purchase-moneys of the said parcels of land at the rate of £5 per cent. per annum as from the respective dates on which the council entered into possession to the date of the lodgment of the said purchase-moneys in Court, and that if necessary a reference to Chambers might be directed to take an account of such interest, and that the said council should lodge the said interest in Court, or otherwise pay or apply the same as might be directed; (2) that the principal sums in Court might be transferred to the credit of the action pending in the Chancery Division in England; and (3) payment of costs.

The district council opposed the claim for interest.

Longfield for the petitioners :—

Interest at 5 per cent. is payable by the council from the time of entry until the money is lodged in Court. The Labourers (Ireland) Act, 1883, sect. 16, incorporates the Lands Clauses Acts as defined by sect. 21. Under these Acts interest was payable: sect. 22 of the Railways Act (Ireland), 1851, repealed and re-enacted by sect. 2 of the Railways Act (Ireland), 1860. By sect. 3 of the Labourers (Ireland) Act, 1896, the incorporation of the Lands Clauses Acts was amended by substituting, with modifications, the provisions of the second schedule of the Housing of the Working Classes Act, 1890, and under Article 24 of that schedule interest is payable, and the provisions of that Article apply in this case. Moreover, sect. 4 of the Labourers Act, 1896, shows that interest is payable even where the landowner does not insist on a deposit being made, or security given, before the council enter.

[He cited *In re Belfast Water Commissioners*; *Ex parte Dalway* (1) *In re Dublin, Wicklow, and Wexford Railway Co.*; *Ex parte Jordan* (2); *Ex parte Daly* (3); *In re Warberton's Estate* (4).]

Even if the petitioner's case does not come within the statutory provisions, the Court will apply the ordinary rules between vendor and purchaser to this quasi-contract of sale, and make the council which has been in occupation of the lands pay interest from the time possession was taken: *Birch* v. *Joy* (5); *Harding* v. *Metropolitan Railway Company* (6); *Rhys* v. *Dare Valley Railway Company* (7).

A. D. Bolton, for the district council :—

No interest is payable here because the owners consented to entry. Section 84 of the Lands Clauses Act, 1845, prohibits the council from entering on the lands without consent, and sect. 85 provides for entry where the owners will not consent, in which case interest is payable. Although sect. 85 has been replaced in Ireland by the various sections of the other Acts cited on behalf of the

(1) 15 L. R. Ir. 13.
(2) 27 L. R. Ir. 79.
(3) [1895] 1 I. R. 169.
(4) 39 I. L. T. R. 126.
(5) 3 H. L. Cas. 565.
(6) L. R. 7 Ch. 154.
(7) L. R. 19 Eq. 93.

Barton, J. 1914.

In re Borrisokane Rural District Council; Ex parte Higginbotham.

petitioners, yet the distinction between entry with consent and without consent is still maintained. Had the petitioners wished to claim interest, they could have compelled the council to comply with Article 24 of the Second Schedule of the Housing of the Working Classes Act, 1890; but they did not do so, and they cannot now make a claim: see the judgment of Sir Edward Sullivan, C., in *Ex parte Dalway* (1). The council did not enter until after the arbitrator had made his award, so that sect. 4 of the Labourers Act, 1896, does not apply. The council is a statutory body, and unless they can be brought within the provisions of the Acts they are not liable: *Bell* v. *Belfast Corporation* (2).

Moreover, if any interest is payable, the rate is 4 per cent., not 5 per cent., as laid down in the cases already cited.

But, in any event, the claim is barred by sect. 51, sub-s. 7, of the Local Government (Ireland) Act, 1898, as it is a claim payable out of the poor rate. By sect. 57, sub-s. 4, of that Act the expenses incurred in the execution of the Labourers Acts are levied as district charges, and raised by means of the poor rate: sects. 44 and 51; see also sect. 17 of the Labourers Act, 1883, and sect. 12 of the Labourers Act, 1906. Although advances are made to councils under sect. 16 of the Labourers Act, 1906, that section would not apply to such a claim as this, as the money advanced under that section is to provide cottages and allotments. But, even if the section did apply, the advance would have to be repaid out of the poor rate. The compensation here was lodged in Court on August 1st, 1913, when all interest ceased to run, and the petition was not presented until February 10th, 1914, when the time limit under sect. 51, sub-s. 7, had expired. It should have been presented before December 30th, 1913.

[He cited *Collen Bros.* v. *Dublin County Council* (3); *R.* (*Monaghan County Council*) v. *Monaghan Urban District Council* (4); *Midland Railway Co.* v. *Edmonton Union* (5); *Sharpington* v. *Fulham Guardians* (6).] Even though the Local Government Board

(1) 15 L. R. Ir. 13, at p. 30.
(2) [1914] 2 I. R. 1.
(3) [1908] 1 I. R. 503.
(4) 2 N. I. J. R. 279.
(5) [1895] A. C. 485.
(6) [1904] 2 Ch. 449.

extended the time, this claim could not be maintained: *Baker* v. *Billericay Guardians* (1).

Longfield, in reply:—

Sect. 51, sub-s. 7, of the Local Government Act, 1898, applies only to claims which are payable exclusively out of the poor rate; here portion of the money would be paid out of other funds, namely, the rents received from the occupiers of the cottages, and the vendors have also a lien for the interest against the lands. Therefore the section does not apply.

BARTON, J.:—

I do not find it necessary to consider the interesting question which Mr. Bolton has raised with reference to the liability of the council for interest in cases where entry is made, with the consent of the owners, upon lands acquired for the purposes of the Labourers Acts. The claim for interest is, in my opinion, barred by sect. 51, sub-s. 7, of the Local Government (Ireland) Act, 1898. The claim, being one which is directly or indirectly payable out of the poor rate, should have been paid within the time limited by that sub-section, or legal proceedings should have been commenced within that period. As no such legal proceedings were commenced, the claim for a declaration that interest was payable by the council must be refused.

Solicitors for the petitioners: *Moore, Keily, & Lloyd.*
Solicitor for the District Council: *James O'Brien.*

R. W. L.

(1) 33 L. J. M. C. 40.

Wylie, J. 1914.

IN THE MATTER OF THE ESTATE OF W. H. N. LOCKE.

July 24.

Land Purchase Acts—Tithe rentcharge subject to a lease where short term unexpired—Tithe rentcharge "payable to the Land Commission"—Redemption—Consent of Treasury—Land Law (Ireland) Act, 1887 (50 & 51 *Vict. c.* 33), *s.* 15, *sub-s.* 3—*Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 37, *sub-s.* 1—*Tithe Rentcharge (Ireland) Act*, 1900 (63 & 64 *Vict. c.* 58), *s* 9—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 64—*Land Commission Rules of 2nd July*, 1910, *Order VIII, Rule* 4.

By a lease made in 1833, certain rectorial tithes, subsequently varied under s. 3 of the Tithe Rentcharge (Ireland) Act, 1900, were demised for a term of 104½ years subject to a rent. This rent, and the reversion in the tithes expectant on the determination of the lease, subsequently became vested in the Land Commission. Portion of the lands subject to the tithes were sold under the Land Purchase Acts. On a question arising as to the redemption price of the tithes issuing out of the lands sold—

Held, following *In re Maunsell's Estate* (MacC. 103), that the tithes were "payable to the Land Commission" within the meaning of section 15, sub-sect. 3, of the Land Law (Ireland) Act, 1887, and that the redemption price that should be allowed was the price settled by the Treasury consent, i.e. 22½ years' purchase.

Question arising on the ruling of the final schedule of incumbrances affecting the purchase-money of the lands sold in this matter under the Land Purchase Acts, as to whether certain leased ecclesiastical tithe rentcharges, formerly issuing out of the lands, should be redeemed at the rate fixed by the Land Commission schedule for the redemption of impropriate tithe rentcharge, i.e., at 21½ years' purchase, or should be treated as tithe rentcharge "payable to the Land Commission," and be redeemed at the fixed price of 22½ years' purchase.

The lands sold in this matter were situated in County Limerick.

Appearing on the final schedule were certain ecclesiastical tithe rentcharges originally amounting to £26 18*s.* 5*d.*, but which had been varied under the provisions in sect. 3 of the Tithe Rent-

charge (Ireland) Act, 1900, to the sum of £20 3*s*. These tithes, with other tithes issuing out of lands situated in certain adjoining parishes, were subject to a lease dated the 13th December, 1833, from the Vicars Choral of the Cathedral Church of St. Mary's, Limerick, to Christopher Delmege, for a term of 104½ years, at the yearly rent of £300, since adjusted to £298 15*s*. 7*d*. The reversion expectant on the determination of this lease was now vested in the Land Commission, and the lessee's interest thereunder in Mrs. Matilda O'Grady and the Misses Kathleen and Annabella Delmege. As portions of the tithes comprised in the lease had from time to time been redeemed on the sales of adjoining estates under the Land Purchase Acts, the purchase-moneys thereof had been placed to the separate credit of "The rectorial tithes formerly paid to Christopher Delmege." The interest on such purchase-money had been paid to the owners of the lessee's interest under the lease, and they had continued to pay the rent thereby reserved to the Land Commission. Hitherto these tithes had been redeemed at not less than 22½ years' purchase. The schedule of redemption prices for impropriate tithe rentcharge had since been issued by the Land Commission, and the vendor now contended that the redemption price of the tithes to be redeemed in this matter should be fixed at the rate therein specified, which for County Limerick was 21½ years' purchase. The Land Commission claimed that they should be treated as tithe rentcharges "payable to the Land Commission," and be redeemed at the rate as settled by the Treasury consent, i.e., at the rate of 22½ years' purchase. The owners of the lessee's interest under the lease also asked that they should be redeemed at this rate.

John Leech, K.C., for the Land Commission:—

The leases of tithes in respect of which the Land Commission receive a rent are of two classes—(*a*) leases which are renewable, or where there is a long outstanding term, and (*b*) leases where there is only a short term still to run. In the case of leases coming within class (*a*) the Land Commission are not concerned with the redemption price of the tithes, as their interest in the reversion is practically valueless, and their rent, renewal fines,

Wylie, J. 1914. *In re* Locke's Estate.

and fees are served out of the redemption price of the tithes; but in the case of leases coming within class (*b*) the Land Commission are vitally interested in the price of the tithes, as they are practically the owners. The present case comes within the latter class.

Under sect. 15, sub-s. 3, of the Act of 1887 no redemption of the rentcharge payable to the Land Commission could be made without the previous consent of the Treasury. In *In re Maunsell's Estate* (1) Holmes, J., held that the tithes, subject to the Delmege lease, came within that sub-section. Sect. 37, sub-s. 1, of the Act of 1896 modified the provision of sect. 15, and enacted that the consent of the Treasury should not be required if the tithe rentcharge were redeemed at not less than twenty years' purchase. But by sect. 9 of the Tithe Rentcharge Act, 1900, this provision does not apply to tithes varied under the terms of the Act. No doubt the effect of the vesting order under sect. 16, sub-s. 1, and of the vesting order and order attaching claims under sect. 24, sub-s. 1, of the Act of 1903, is to make the claim in respect of these tithes attach to the purchase-money, but the price cannot be fixed without the consent of the Treasury. Order VIII, Rule 4, of the Land Commission rules of the 2nd July, 1910, recognizes this by excluding tithe rentcharge payable to the Land Commission from the superior interests the redemption price of which is to be determined by the Judicial Commissioner. The price settled by the Treasury consent for tithe rentcharge payable to the Land Commission is 22½ years' purchase.

R. F. Holmes, for the vendor:—

The Land Commission rules cannot extend the provisions of the Act of Parliament, and by sect. 64 of the Act of 1903 the redemption price of all superior interests is to be determined by the Judicial Commissioner in the absence of consent. The redemption price of these tithes should be fixed at the rate current for the redemption of impropriate tithe rentcharge in county Limerick, i.e., 21½ years' purchase.

(1) Mac C. 103.

Wylie, J. 1914. *In re* LOCKE'S ESTATE.

WYLIE, J.:—

I am bound by the decision in *In re Maunsell's Estate* (1), where it was held that the tithes subject to this lease were payable to the Land Commission within the meaning of sect. 15, sub-s. 3, of the Act of 1887, and, accordingly, that the consent of the Treasury to redemption was necessary. The price of 22½ years' purchase has been settled by the Treasury consent. I will, accordingly, decide in accordance with Rule 4 of Order VIII of the Rules of the 2nd July, 1910, and allow the amount mentioned in the receivable order.

Solicitor for the Land Commission: *William Alexander.*

Solicitor for the vendor: *P. T. Liston.*

Solicitors for the owners of the lease: *Martley & Barlee.*

J. E. W.

M. R. 1914. May 15. July 17.

IN RE GREENE, DECEASED; FENNELLY *v.* CHEATOR AND OTHERS.

(1914. No. 351.)

Charity—Bequest to monastic order—Validity—Bequest or the decoration or improvement of the Roman Catholic Church of the Carmelite Fathers—Roman Catholic Relief Act, 1829 (10 *Geo.* 4, *c.* 7).

A testatrix by her will directed that portion of the residue of her estate should be applied "for the decoration or improvement of the Roman Catholic Church of the Carmelite Fathers at Clarendon Street, in the city of Dublin."

Held, that the bequest was a valid charitable bequest, and was not void under the Roman Catholic Relief Act, 1829.

Carbery v. *Cox*, 3 Ir. Ch. R. 231; *Sims* v. *Quinlan*, 16 Ir. Ch. R. 191, 17 Ir. Ch. R. 43; *Kehoe* v. *Wilson*, 7 L. R. Ir. 10; *Liston* v. *Keegan*, 9 L. R. Ir. 539; *Roche* v. *M'Dermott*, [1901] 1 I. R. 394; *Hearn* v. *Donnellan*, [1901] 1 I. R. at p. 402, note; *Murphy* v. *Hynes*, [1906] 1 I. R. 505—considered.

ORIGINATING SUMMONS.

The testatrix, Mary Eleanor Greene, by her will, dated the 27th October, 1913, directed that the residue of her estate, after providing for pecuniary legacies and for the payment of her debts, and funeral and testamentary expenses, should be

(1) Mac C. 103.

M. R. 1914.

In re GREENE. FENNELLY *v.* CREATOR.

invested, and the income thereof paid to Isabella Molloy during her life, and that after her death the said investments should be realized and applied in equal shares for the decoration or improvement of the Roman Catholic Church of the Carmelite Fathers at Clarendon Street, in the city of Dublin, and the Roman Catholic parish church of St. Alphonsus, Ballybrack, in the county of Dublin. By a codicil dated the 28th October, the testatrix declared that all such parts of her property that should be subject to any devise or bequest that should be declared void or inoperative by reason of the same being declared illegal, or by reason of her death within three months of executing her will, should become the absolute property of the Most Reverend William J. Walsh, Roman Catholic Archbishop of Dublin. The testatrix died on the 31st October, 1913, and her will was proved by the plaintiff, who was one of the executors and trustees therein named, on the 15th January, 1914.

This summons was taken out by the plaintiff for the determination (*inter alia*) of the question whether or not the above bequest was void as to the moiety thereof bequeathed for the decoration or improvement of the church of the Carmelite Fathers at Clarendon Street, under the policy of the Roman Catholic Relief Act, 1829.

A. E. Clery, for the plaintiff :—

Pigot, K.C., for the Carmelite community, Clarendon Street :—

A gift of a sum of money to decorate and improve a church, *Attorney-General* v. *Ruper* (1), or for the perpetual repair of ornaments in a church, *Hoare* v. *Osborne* (2), is charitable within the Statute 43 Eliz. c. 4. At common law a gift to a monastic church in the form, *e.g.* of a gift "to God, and St. Benet of Ramsey Abbey, and the Abbot Walter and the monks of St. Benet," was pious, and therefore charitable, unless illegal: Pollock and Maitland, History of English Law, vol. i, 222, cited by Palles, C.B., in *O'Hanlon* v. *Logue* (3).

The test of illegality is the object of the donor to benefit, directly or indirectly, the members of a monastic community as such: see *Sims* v. *Quinlan* (4), where Brady, C., says, "Is

(1) 2 P. Wms. 126.
(2) L. R. 1 Eq. 585.
(3) [1906] 1 I. R., at p. 269.
(4) 17 Ir. Ch. R., at p. 50.

not then a devise or bequest, which is intended to operate for the purpose of enabling a person to commit a misdemeanor, within the provisions and scope of the Act by which that misdemeanor is created, and as such prohibited as the crime itself? It appears to me that the bequest in the present case has naturally the effect of aiding and encouraging another person to violate the law, and is within the doctrines applicable to such offences." The bequest to which the Lord Chancellor refers was one of £500 "to be applied for the maintenance and education of two priests of the order of St. Dominick in Ireland." In *Carbery* v. *Cox* (1) the first gift of £20 yearly to the monks of Shandon, "to provide clothing for the poor children attending their school," was held good on the ground that "the school . . . and the children who should attend it, were those in the contemplation of the testator": *per* Blackburne, C., *Carbery* v. *Cox* (2). See also *Cussen* v. *Hynes* (3), judgment of FitzGibbon, L.J.

But an illegal community may take a bequest expressly devoted to a lawful purpose: *per* FitzGibbon, L.J., in *Cussen* v. *Hynes* (4).

Kehoe v. *Wilson* (5) and *Liston* v. *Keegan* (6) are apparently against me; but in the first of these Chatterton, V.-C., decided against the validity of the bequest partly on the ground (see p. 17) that if the legacies had not been given, the monks would have had to provide the money for the chapels out of their own funds. In the present case the object of the bequest is the decoration or improvement of the church, which involves no necessary expense, while in *Kehoe* v. *Wilson* (5), the objects of the bequests were, the repair and maintenance of churches belonging to a monastic order, the acquisition of the site of such a church, and the building of such churches. In *Liston* v. *Keegan* (6) the point was never argued, the only question discussed being whether the Vincentian Order was "a religious community or society bound by religious or monastic vows," to whom the prohibition of the Roman Catholic Relief Act (10 Geo. 4, c. 7) applied.

(1) 3 Ir. Ch. R. 231.
(2) 3 Ir. Ch. R., at p. 234.
(3) [1906] 1 I. R., at p. 546.
(4) [1906] 1 I. R., at p. 545.
(5) 7 L. R. Ir. 10.
(6) 9 L. R. Ir. 531.

M. R. 1914.

In re GREENE. FENNELLY v. CHEATOR.

If the object of the bequest is held to be lawful, the Court of Chancery has jurisdiction to see that the money is applied to that object: see *per* Barry, L.J., in *In re Wilkinson's Trusts* (1). [He also referred to *In re Smith, Johnson* v. *Bright-Smith* (2).]

Murnaghan, for the Most Rev. William J. Walsh, Roman Catholic Archbishop of Dublin :—

I do not wish to dispute the validity of the bequest, but in the event of its being held void by the Court, I claim under the codicil.

Rearden, for the Attorney-General.

July 17.

Cur. adv. vult.

O'CONNOR, M.R. :—

In this matter a summons was issued for the purpose, among others, of determining whether the bequest contained in the will of Mary Eleanor Greene, dated the 27th October, 1912, of one moiety of her residuary estate for the decoration or improvement of the Roman Catholic Church of the Carmelite Fathers at Clarendon Street, in the city of Dublin, is void.

The church is a public church, in the sense that it is used for public worship. It is, however, the private property of individual priests, who are Carmelites, and are members of a community of men bound by monastic vows.

A bequest for the decoration or improvement of a church is, without doubt, a valid charitable bequest, and the invalidity of the bequest in the present case must arise, if at all, from the fact that the church in Clarendon Street is the property of a monastic community.

Until recently, it would occur to most of us that the last word had been said upon bequests of the character I have mentioned, and that it had been settled by a long line of authorities, beginning with *Carbery* v. *Cox* (3), that a devise or bequest for the benefit of a church or chapel belonging to monastics is void as against the policy of the Roman Catholic Relief Act. But a judgment, which has attracted the attention of lawyers, and excited a good deal of interest, has lately been pronounced by Mr. Justice Joyce in the High Court in England in *In re Smith, Johnson* v. *Bright-Smith* (2), in which the Irish authorities have

(1) 19 L. R. Ir., at p. 543.
(2) 30 T. L. R. 411 ; since reported [1914] 1 Ch. 937.
(3) 3 Ir. Ch. R. 231.

been very adversely dealt with. His judgment is, of course, not binding on this Court; but the opinion of an eminent English judge must always carry weight, and in the present case imposes the necessity of once more investigating the authorities on this branch of the law of charities, which has overshadowed the legal rights of monastic orders of men.

It is scarcely necessary to refer in detail to the sections of the Roman Catholic Relief Act (10 Geo. 4, c. 7) which deal with monastic bodies. Over and over again they have been cited. Suffice it to say that they provided for the "gradual suppression and final prohibition" of such bodies in the United Kingdom, and in order to effect that object they imposed severe penalties—fines, imprisonment, banishment, and transportation—for certain offences enumerated by the statute, viz.:—"Non-registration of members already within the realm, coming into the realm, admitting any person into a monastic order, or entering any such order." Such are the penal provisions of a statute which is generally called "The Emancipation Act." These penal provisions are, however, part of the law of the land, and this Court has nothing to say to their justice or injustice. The law, as it is found, must be enforced.

It is, however, a principle of the criminal law that the criminal is only liable to the penalty imposed by the appropriate statute or by the common law. Once he pays that penalty he is free. So, in the enforcement of the penal provisions of the Roman Catholic Relief Act, monastics became liable to the penalties thereby imposed, but to none other. This is the point which is emphasized in the judgment of Mr. Justice Joyce, to which I have referred.

Bearing this in mind, it is difficult to see how in principle a bequest for the decoration or improvement of a church is void by reason of its being the property of a monastic body. No doubt that body is, under the Act, liable to be "gradually suppressed and finally prohibited"; but the ways and means provided for accomplishing the process of suppression and final prohibition have been specially prescribed by the statute, and I do not think that it lies with this Court to add to the penalties thereby imposed the further penalty which is involved in the disability to take property under a devise or bequest. Of course, if it has been clearly

M. R. 1914.

In re GREENE. FENNELLY *v.* CHEATOR.

declared by the judgments of the Irish Courts, whether of superior or co-ordinate jurisdiction with this Court, that the disability exists, I am bound to follow them, however strong my individual opinion may be against it; but the conclusion seems to me to be so contrary to legal principle that I feel obliged to review authorities which have been familiar to every Irish lawyer by frequent reference and comment in our Courts. The recent criticism which they have encountered in the English Court would alone be sufficient justification for doing so.

Before dealing with the Irish authorities let me premise this. The supposed disability of monastic bodies to acquire property, though not expressly enacted by the Roman Catholic Relief Act, arises, as has been said, out of its policy. Let us see, then, what that policy was. We have a declaration of it in the Act itself. It was "gradual suppression and final prohibition." The final prohibition has not yet come. It may never come. But gradual suppression involves limited toleration, and I do not see how a Court of equity can define the limits which have been purposely left indefinite by statute. Is it for this Court to say, in the absence of statutory enactment, that the proprietorial rights of monastics are to be limited to the clothes they wear and the bread they eat? This would indeed be a compulsory enforcement of one of these monastic vows which are so obnoxious to British law.

With all the respect due to those who have attached the disability to hold property to monastic bodies on the supposed policy of the statute, I think that they have subjected it to an imperfect examination. It appears to me that the policy of an Act of Parliament is to be sought for, not merely in what it prohibits, but also in the means it provides for enforcing the prohibition. We have, no doubt, in the Roman Catholic Relief Act the policy of gradual suppression, but we also have the policy of accomplishing that object by the imposition of particular penalties. Is there not a violation of the latter policy when other unspecified penalties, in the shape of civil disabilities, are inflicted?

Mr. Justice Joyce attributes the errors which in his opinion pervade the Irish judgments to reliance upon that "very unruly

horse"—public policy. It has also been said of this unruly animal that it is "a restive horse, and when you get astride it, there is no knowing where it will carry you." Let us see where it would carry us in the present case. Monastics are not to be allowed to acquire property by devise or bequest. Why stop there? If it is against policy to allow them to acquire property in this way, it is equally against policy to allow them to acquire it in any other way. They should not then be allowed to acquire it by purchase—not even a house for a dwelling. Nor should they be allowed to acquire rights by contract. See where this leads us. The monastic is not merely liable to fine and imprisonment, but he becomes an outlaw. If it is against the policy of the law to allow him a bequest, it is equally against its policy to allow him any other right, so that if monastics acquire a building for their monastery, the vendor who has sold to them can repudiate his conveyance and eject them; or if monastics carry on a school, they have no legal right to recover school fees. What a ridiculous plight for British law in a country where public money is every day paid to monastics for the purposes of education! This is the quagmire into which the "unruly horse" has leaped. Let us now see whether we are really brought there by judicial authority.

Carbery v. *Cox* (1) is the first important case since the passing of the Roman Catholic Relief Act. This dealt with two separate bequests:—(1) a bequest of £20 yearly to the monks of Shandon to provide clothing for the poor children attending their school; (2) a reversionary annuity to the monks of Mount Melleray, to be appropriated to the improvement of the chapel of Melleray, and the lands belonging thereto. The first bequest was declared to be valid, and the second to be invalid and void. It is to be noted that in each case the legatees were monks. As to the first, the Lord Chancellor (Blackburne) said:—"It was objected that as I could not give effect to a bequest to monks, nor recognize them as having schools, the bequest was altogether void. In support or this argument Mr. Fitzgerald relied on the case of the *Attorney-General* v. *Goulding* (2), and other cases containing the same doctrine. They, however, do not appear to me to govern the case before me; for, connecting the finding, that Mr. Broderick

(1) 3 Ir. Ch. R. 231. (2) 2 Br. C. C. 128.

M. R. 1914.

In re GREENE. FENNELLY *v.* CHEATOR.

was the principal, and, as I must infer, known to the testator to be the principal, officer or member of this community, I think he is to be considered as the person, or at least as one of the persons, described, and consequently that the school kept by him, and the children who should attend it, were those in the contemplation of the testator I therefore see no difficulty in paying to him, and to any of the persons who at the testator's death were members of this body," etc. In other words, although the bequest was to a monastic community, it was valid because given for a charitable purpose. This was the only point decided, although it seems to have been assumed that, if the bequest was to the monks without any charitable trust, it would have been invalid. Monks, therefore, could be the duly authorized ministers of a charity. As to the second bequest, the Lord Chancellor said :— "The finding as to this is, that the defendant, the Rev. Matthew Joseph Ryan, who is the successor of the Very Rev. Michael Vincent Ryan, deceased, is the abbot and principal of the monks of Mount Melleray. From this I infer that, since the death of the testator, Michael Vincent, who was then the abbot or principal, has died ; so that I cannot recognize any right in his successor, neither can I discover any charitable purpose that can authorize the Court in directing a scheme. The case therefore seems to me to be one in which there is but one particular object ; and as that cannot be answered, the residuary legatee must take." This part of the judgment is somewhat obscure, but it is not difficult to find the underlying reasons. They have no connexion with the monastic character of the monks. There are two wholly distinct reasons which were evidently present to the Lord Chancellor's mind—one, that the defendant who claimed the legacy was not a legatee at all; the other, that the legacy was not for an exclusively charitable purpose, as it clearly was not, because it was for the improvement of the chapel *and the lands*. I call attention to this, because *Carbery* v. *Cox* (1) has been the authority relied upon as establishing that a gift for the benefit of a public church belonging to a monastic community is invalid. I cannot find in it any such decision, and I strongly suspect that

(1) 3 Ir. Ch. R. 231.

the purport of the Lord Chancellor's judgment has been misunderstood as a consequence of the omission to notice that the bequest was for the church *and lands*, and not for the church only. I may mention that the statement of facts in the report is inaccurate in omitting "and the lands belonging thereto," as is proved by reference to the original record.

So far from *Carbery* v. *Cox* (1) being an authority for invalidating a bequest for the benefit of a church belonging to a monastic order, Mr. Pigot, counsel for the legatees, cited it with effect in favour of the validity of the bequest. It establishes that monks may be appointed to administer a charity, as in the case of the monks of Shandon. The maintenance of a church for religious services is as much a charity as providing clothes for poor children; and if monks may accept a gift for the latter purpose, they ought to be allowed to do so for the former.

The next leading case is *Sims* v. *Quinlan* (2). This case is concerned with two bequests:—(1) a bequest of £500 to two Roman Catholic priests to be applied as they should deem best for the education and maintenance of two priests of the order of St. Dominick in Ireland; and (2) a bequest of £500 upon a secret trust to apply it towards the redemption of the rent of a Roman Catholic church belonging to Dominicans, and one of the ordinary and principal places of worship in the city of Cork. Both bequests were declared void. The original judgment was given by the Master of the Rolls, Mr. T. B. C. Smith, and in dealing with the first bequest he truly says that there is no provision in the statute 10 Geo. 4, c. 7, making a bequest in favour of persons bound by monastic vows void; and that sect. 15 of 7 & 8 Vict. c. 97, containing the proviso, "Provided always that nothing herein mentioned shall be construed to render lawful any donation, devise, or bequest to or in favour of any religious order, community, or society of the Church of Rome bound by monastic or religious vows, prohibited by an Act passed in the 10th year of the reign of King George the Fourth, entitled 'An act for the Relief of His Majesty's Roman Catholic Subjects,' or to or in favour of any member or members thereof," carried the matter no further than

(1) 3 Ir. Ch. R. 231. (2) 16 Ir. Ch. R. 191; 17 Ir. Ch. R. 43.

M. R. 1914. *In re* GREENE. FENNELLY *v.* CHEATOR.

the 10th Geo. 4, c. 7, and was only intended to exclude bequests contrary to its policy. This interpretation of 7 & 8 Vict. c. 97, so far as it rejected any suggestion that it added to the penalties imposed by the 10th Geo. 4, c. 97, seems to be incontrovertible. It seems plain that it was only intended to ensure that what was previously unlawful should not thereby be made lawful. The Master of the Rolls, however, thought that the proviso referred to bequests void as against the policy of the Roman Catholic Relief Act; and finding that the bequest to the two priests for the education and maintenance of two Dominicans was contrary to that policy, he declared the bequest void. It is remarkable, however, that this was not the ground of the decision of the Court of Appeal. That Court held that the bequest was in direct violation of the Act, as no doubt it was, because it was in substance a bequest for making Dominicans, which was directly and expressly prohibited by the 33rd section. The Lord Chancellor said (p. 50): "This is not a question of the policy of the law . . . We may possibly admit that the decision of the Master of the Rolls in this part of the case was right; but he seems to have taken for granted far too easily that such bequests were not directly prohibited by any Act of Parliament." That distinguished judge had evidently no great belief in the argument founded on policy. He thought that direct prohibition was a much more satisfactory ground for his decision that the legacy was void. So far, then, we have no reliable authority on the policy of the Act.

It is obvious that a bequest for the education of Dominicans, which was really one to aid the admission of young priests into the Order in direct violation of the 33rd section, is quite different in character from one for the benefit of a church the property of a monastic order. There is no prohibition in the Act against monks officiating in public churches, and neither in the Rolls Court nor in the Court of Appeal was it suggested that there was. There was indeed but little attention given to the second bequest for the redemption of the rent of the Dominican Church. It was assumed to be covered by the decision in *Carbery* v. *Cox* (1). No

(1) 3 Ir. Ch. R. 231.

notice whatever was taken of the fact that the bequest there was for the improvement of the church and the lands belonging thereto —the latter object introducing a non-charitable element—and that it was because there was not an exclusively charitable purpose, that the gift could not be claimed by the successor in office of the abbot who was living at the testator's death. I cannot therefore regard the decision in *Sims* v. *Quinlan* (1) on the bequest for the benefit of the church as a very convincing one, and I must look for guidance to the later authorities.

This brings me to *Kehoe* v. *Wilson* (2), in which it was decided by the Vice-Chancellor that legacies for the repair and maintenance of churches belonging to monastic orders were void. As *Sims* v. *Quinlan* (1) proceeded on the authority of *Carbery* v. *Cox* (3), so the Vice-Chancellor's decision was based upon both, and thus we have a growing superstructure resting on a bad foundation. Again we have it erroneously stated that the bequest in *Carbery* v. *Cox* (3) was for the chapel. The Vice-Chancellor concludes his judgment by saying, "I am of opinion that these legacies would be for the benefit of the monastic orders; and I concur in the argument addressed to me by Mr. Carton, that if the legacies had not been given, these monks would have to provide the money for the chapels out of their own funds. The principal objects are the monks of those orders, though the public are meant to worship in these chapels." So apparently if the bequests were, in the Vice-Chancellor's mind, for the benefit of the public principally, they would have been valid, even though they were to pass through the hands of monks. This would certainly harmonize with that part of the decision in *Carbery* v. *Cox* (3) relating to the bequest to the monks of Shandon. In *Kehoe* v. *Wilson* (2) there was a further bequest for masses to be celebrated in a public church. This, too, was held to be void, on the ground that it was not for a charitable purpose, and attempted to create a perpetuity—a decision so contrary to law that it must weaken the authority of *Kehoe* v. *Wilson* (2) in every part.

I now come to *Liston* v. *Keegan* (4), which was decided by my

(1) 17 Ir. Ch. R., at p. 50.
(2) 7 L. R. Ir. 10.
(3) 3 Ir. Ch. R. 231.
(4) 9 L. R. Ir. 539.

M. R. 1914.

In re GREENE. FENNELLY *v.* CHEATOR.

eminent predecessor in this court, the late Sir Edward Sullivan. There it was held that a bequest left upon a secret trust for the benefit of the Roman Catholic chapel at Phibsborough was void, because that chapel was the property of the Order of Vincentians, who are bound by monastic vows. Here, no doubt, is a decision point-blank on the question now before this Court, whether a monastic order, liable to the pains, penalties, and disabilities specially imposed by the Roman Catholic Relief Act, is liable to the further disability of not being competent to accept a gift made for the undoubtedly charitable purpose of providing means for public religious worship. But a perusal of the report of the argument of counsel and the judgment of the learned judge shows that there was absolutely no discussion on this all-important question. It appears to have been assumed by all parties that it was absolutely closed by *Carbery* v. *Cox* (1) and *Sims* v. *Quinlan* (2), the only questions discussed being whether the Vincentians were a monastic order, and whether, if they were, the Act applied to orders not established in Ireland at the time the Act was passed. It was found that the Vincentians were a monastic order, and it was decided that the Act applied to them, with the necessary result, as it was assumed, that the legacy was void. Here is another story raised upon a foundation supposed to consist of solid material, but subjected to no examination. With all the respect due to such a very eminent judge as Sir Edward Sullivan (and no one admired or respected him more than I did), I cannot accept the judgment in *Liston* v. *Keegan* (3) as satisfactory. I am, however, bound by it, unless it appears to be inconsistent with subsequent authorities. It may be truly said that the fact that there was no argument on what I consider to have been the real question is only proof that it was then admitted by all lawyers that monastics were disabled from acquiring property, even for the purpose of affording the means of public worship. That was certainly the prevailing view, and this fact in the history of legal opinion must receive due weight; but legal opinion, like every other mode of thought, is subject to aberrations, and it is not to

(1) 3 Ir. Ch. R. 231.
(2) 17 Ir. Ch. R., at p. 50.
(3) 9 L. R. Ir. 531.

be blindly followed where it ignores the enduring principle of British law, that even the most hardened criminal is only liable to the punishment prescribed for his offence. This is the principle which has been reiterated by Mr. Justice Joyce, and is the basis of the remarkable judgment which he recently delivered.

I am driven, then, to a further investigation of judicial pronouncements on that branch of the law of charities which deals with bequests to monastics, in order to see whether the decisions I have referred to are now to be taken as ruling authorities.

Mr. Justice Joyce mentioned that nearly all the cases which he reviewed, and which he so strongly disapproved, were judgments of the Vice-Chancellor. Well, I can only say that if they were wrong, *humanum est errare*. A good part of my life at the Bar was spent in his Court, and I entertain no other feeling for his memory than that of deep respect and admiration. There never was a more conscientious judge, or one who had a greater sense of duty. He was a most able administrator of the law, and his judgments must always carry weight. His judgments were not invariably against bequests to monastic orders, as is shown by his decision in *Hearn* v. *Donellan* (1), which is to be found reported in a note to *Roche* v. *M'Dermot* (2). In that case there was a bequest to the Christian Brothers (monastic order) for the maintenance of their schools in Ballinrobe. That was held to be a good charitable legacy. I am unable to see any distinction in principle between this legacy and that in *Kehoe* v. *Wilson* (3). In *Hearn* v. *Donellan* (1), the legacy was for a charitable purpose, viz., that of education, but the legacy in *Kehoe* v. *Wilson* (3) was for an equally good charitable purpose—for religious worship. It will be remembered that in giving judgment in this case the learned Vice-Chancellor adopted the argument of the late Mr. Carton, that if the legacies had not been given the monks would have had to provide the money for the chapels out of their own funds. Surely the very same observation applies to the gift for maintenance of the Christian Brothers' schools. If they did not get the legacy, they would have had to apply so much for main-

(1) [1901] 1 I. R., p. 402, note.
(2) [1901] 1 I. R. 394.
(3) 7 L. R. Ir. 10.

M. R. 1914. In re GREENE. FENNELLY v. CHEATOR.

tenance out of their own private resources. *Hearn* v. *Donellan* (1) was the later decision, and although the Vice-Chancellor does not appear to have intended to overrule his previous decision, he, in fact, did so. The report is no doubt a very meagre one, but it is certain that his judgment was deliberate, because he referred to it in *Murphy* v. *Cheevers* (2), where there was a gift to the Christian Brothers *simpliciter*, which he held to be void, saying that it did not come within the principle of *Hearn* v. *Donellan* (1), where he held that a bequest to a school attached to the community was good.

The next case which I wish to refer to is *Roche* v. *M'Dermot* (3), in which my distinguished predecessor, Sir Andrew Porter, gave judgment. There the bequest was in these terms:—"I leave to the Rector of the Jesuits at Mungret, in aid of the school there for the training of pupils intended for the Church, the sum of £500." This legacy was held to be valid, because, although the legatee was a Jesuit, and the legacy might possibly be an indirect benefit to the order, the testator intended it for a good charitable purpose, viz., the training of pupils intended for the Church. In other words, a legatee or legatees may be under a legal disability; but if the legacy is given for a valid charity, it must prevail. Sir Andrew Porter in his judgment said:—"I have very often said that it appears to me to be a crying injustice that a system of law depending upon religious disabilities should be enforced in this branch of the Courts in reference to property, and used as an engine for the purpose of defeating the otherwise lawful intentions of testators, when it was not directly intended for that purpose, and when the enactments themselves have been allowed to become a dead letter for the last eighty-two years." I respectfully emphasize these words, and I say further—let the criminal law have its own victims, and let it not be said of a Court of equity that it takes upon itself the prerogative of adding to the penalties imposed by a criminal statute.

One other example of a bequest to the Superior of a

(1) [1901] 1 I. R., p. 402, note.
(2) 17 L. R. Ir. 205.
(3) [1901] 1 I. R. 394.

monastic order in his official capacity for a charitable purpose is to be found in *Murphy* v. *Hynes* (1). There the gift was to the Superior of the Franciscan Capuchin Monastery at Rochestown in aid of the school there for the education of priests for the foreign mission. The purpose was held to be a good charity, and the legacy was declared valid by Mr. Justice Barton.

I must not, however, overlook the judgment of the Court of Appeal in *Cussen* v. *Hynes* (2), in which two legacies, (1) for the education of a priest of the Capuchin order, and (2) for the Superior of a Capuchin community for the community, were declared to be void. I have already pointed out that a bequest of the character of the first is a direct violation of section 33 of the Roman Catholic Relief Act, because it provides means for the commission of a criminal offence, viz., admission into a monastic order. As to the second, while personally I cannot, for the reasons I have already stated, adopt the view that a person, or a number of persons, who have committed the misdemeanour of being admitted into a monastic order, and thereby become liable to certain penalties, have incurred the further penalty, not authorized by the statute or common law, of disability to acquire property under a devise or bequest—while personally I cannot adopt that view—I shall be bound to follow the decision of the Court of Appeal in this country until overruled by a higher tribunal.

The bequest we are concerned with in the present case is not, however, of the same character. It is not a gift to a monastic community for its own purposes. It is given for the decoration or improvement of a church whose purpose is public worship. It is the public who are really the charitable objects; the legatees are only administrators of the charity. The case seems to me to come within the principle conceded by FitzGibbon, L.J., in *Cussen* v. *Hynes* (2), and which I take the liberty of unhesitatingly affirming, that "a community, illegal as such, may be made the recipient of a bequest expressly devoted to a lawful purpose which the community is bound to carry out." This I conceive to

(1) [1906] 1 I. R. 505. (2) [1906] 1 I. R. 539.

M. R. 1914. *In re* GREENE. FENNELLY *v.* CHEATOR.

have been repeatedly recognized in such cases as *Hearn* v. *Donellan* (1) and *Roche* v. *M'Dermot* (2), to which I have referred. For these reasons I declare the bequest contained in the will of Mary Eleanor Greene for the decoration or improvement of the Roman Catholic Church of the Carmelite Fathers at Clarendon Street, is a valid charitable bequest so far as it is payable out of pure personal estate. I confine the declaration to personal estate, because the testatrix died within three months from the date of her will, and the charitable gift failed so far as it included real estate.

Solicitor for the plaintiff: *J. J. Meagher.*

Solicitor for the Carmelite Community, Clarendon Street: *T. J. MacGrath.*

Solicitors for the Most Rev. William J. Walsh, Roman Catholic Archbishop of Dublin: *A. O'Hagan & Son.*

Solicitor for the Attorney-General: *George Collins.*

A. H. W.

(1) [1901] 1 I. R., at p. 402, note. (2) [1901] I. R. 394.

[NOTE—But see *Ellard* v. *Phelan* (*ante*, p. 76).—REP.]

THE REV. FLETCHER SHERIDAN LE FANU, FANE VERNON, ARTHUR FLEURY, THE VERY REV. JAMES HORNIDGE WALSH, THE RIGHT REV. JOHN HENRY BERNARD, BISHOP OF OSSORY, JAMES HERBERT SHAW, CHARLES P. COOTE CUMMINS, GILBERT ARCHER, AND JOHN DRAPER

v.

GEORGE RICHARDSON, JOHN E. JOHNSTON, CHARLES HENRY SHANNON, HENRY H. S. WOLSELEY, FREDK. M'GARVEY, R. J. SEARSON, TOM HOLTON, AND CHARLES STANLEY.

Barton, J.
1914.
Feb. 25, 26, 27.
Mar. 4, 5, 25.
Appeal.
May 11, 12, 13, 14, 18.

Churchwardens—Sidesmen—Election of—Proprietary church—Irish Church Building Acts (6 & 7 *Wm.* 4, *c.* 31; 3 & 4 *Vict. c.* 101; 12 & 13 *Vict. c.* 99; 14 & 15 *Vict. c.* 72)—*Irish Church Act,* 1869 (32 & 33 *Vict. c.* 42), *ss.* 12, 19, 20, 70—*Constitution of Church of Ireland, chap.* iii, *ss.* 1, 3.

The Irish Church Act, 1869, empowers a general synod of the Church of Ireland to frame constitutions and regulations for the management of the Church and property and affairs thereof. By sect. 70, nothing in the Act is to affect the patronage or right of presentation to any proprietary church, or affect the property in any such church, or the property held for the purposes of or appropriated to the use of the same, or affect the continuance of the trust relating thereto as originally constituted.

The proprietary church of St. John the Evangelist, Sandymount, was founded and endowed by private munificence by a lease and a deed of endowment and trust made in the year 1850, under the provisions of the Irish Church Buildings Acts (afterwards consolidated and amended by 14 & 15 Vict. c. 72). In the year 1913, the registered vestrymen of the church, at a meeting of the Easter vestry, elected one of their number, J., as parishioners' churchwarden. The election of such churchwarden by the registered vestrymen was in accordance with the provisions for the election of churchwardens contained in the Constitution of the Church of Ireland, framed by the general synod under the power conferred by the Irish Church Act, 1869, but was inconsistent with the trusts in the deed of endowment and the provisions of the Church Building Acts. At the same meeting, the registered vestrymen appointed six of their number to be sidesmen. This practice of electing a parishioners' churchwarden and sidesmen by the vestrymen had been adopted immediately after the passing of the Irish Church Act, 1869, and followed for forty years.

Barton, J.
1914.
LE FANU
v.
RICHARDSON.

Held, by Barton, J.—(1) that the election of churchwardens of St. John's Church was governed by the provisions in the Constitution of the Church of Ireland, and that that election of J. as churchwarden was valid; but (2) that no power to appoint sidesmen was given by the Constitution of the Church of Ireland, or the trust deed, or the Church Building Acts, and that the election of the sidesmen was void, and that they should be restrained by injunction from acting as such.

Held, by the Court of Appeal (reversing Barton, J., on the first point), that the effect of sect. 70 of the Irish Church Act, 1869, was to exclude a proprietary church such as St. John's from the provisions of the Constitution of the Church of Ireland as to the appointment of churchwardens, and that the election of J. as churchwarden was void, and that he should be restraine by injunction from acting as such.

TRIAL OF ACTION.

In the year 1850, the Right Honourable Sidney Herbert erected and endowed, pursuant to the provisions of the Church Building Acts, 6 & 7 Wm. 4, c. 31, 3 & 4 Vict. c. 101, and 12 & 13 Vict. c. 99, a chapel of ease, as a proprietary church for the cure of souls, called the Church of St. John the Evangelist, Sandymount. By an indenture of lease dated the 31st March, 1850, the said Right Honourable Sidney Herbert demised that parcel of land part of the lands of Baggotrath and the said church erected thereon to Francis Norman for a term of 150 years at the yearly rent of 10*s.* upon trust to assign the same in such manner that the said parcel of land with the church and building erected thereon and the appurtenances thereof should become vested in certain persons parties to the said indenture, their executors, administrators, and assigns, upon and for the trusts, intents, and purposes and subject to the powers and declarations thereafter to be declared concerning the same. By an indenture of endowment and trust, dated the 1st April, 1850, the said parcel of land and church erected thereon were duly assigned to the trustees named therein and parties thereto, for the said term of 150 years upon and for the trusts, intents, and purposes, and subject to the powers and provisions thereinafter declared concerning the same; and the said trustees therein did mutually and reciprocally covenant, promise, declare, and agree that they and each of them and their executors, administrators, and assigns

should become jointly bound to the others and other of them by and under the title of Trustees of the Church of St. John the Evangelist, Sandymount, for the trusts and purposes and subject to the provisions, declarations, limitations, and agreements therein and in the said Acts of Parliament therein in part recited in that behalf mentioned and declared. The said indenture of endowment and trust further witnessed that the said trustees would stand possessed of and hold the said lot of ground so demised and the church erected thereon, and also certain moneys invested for the endowment of the same to the uses and upon the following trusts:—

(*a*) That the minister to be appointed by the said trustees from time to time to officiate in the said church should be a minister of the united Church of England and Ireland as by law established, and duly ordained; and as often as any vacancy should occur by resignation or death of such minister or any succeeding minister, that the said trustees should elect, nominate, and appoint within six months after such vacancy should have arisen such other clergyman duly qualified as they or the majority of such trustees should agree to be the minister of the said church, and duly nominate him to be licensed by the Archbishop of Dublin for the time being.

(*b*) That the minister for the time being of the said church, subject to the rules and regulations contained in said indenture and also to the lawful control of the Archbishop for the time being, should have the exclusive management, control, and discretion of any matter and thing relating to the said church, save as therein or otherwise directed, and that he should, subject as aforesaid, have the appointment, control, and power of removal of all and every inferior officers or other persons from time to time employed in the said church.

(*c*) That the trustees of the said indenture should have full power to nominate and appoint three or more lay gentlemen who should be in the habit of frequenting the said church to act in the capacity of a lay committee or church or chapel wardens in respect of the said church, and from time to time to remove them or any of them and appoint others in their place and stead; and that it should be no part of the duty of the said committee or church or

Barton, J. 1914.

LE FANU v. RICHARDSON.

chapel wardens to take care of the repairs of the said church or the management of the funds thereof.

By an indenture dated the 16th day of August, 1879, the reversion expectant on the aforesaid lease was duly granted and released to the surviving trustees, their heirs and assigns, upon the trusts, and subject to the powers and provisions contained in the aforesaid indenture of endowment and trust of the 1st April, 1850.

From the year 1850 to the year 1852, the trustees appointed churchwardens, and from that date till the year 1870 the minister of the church for the time being and the pew-holders elected and nominated two churchwardens in the manner provided by section 27 of 14 & 15 Vict. c. 72. After 1870, and till 1910, churchwardens were appointed every year at a meeting of the Easter vestry by the registered vestrymen, as provided by the Constitution of the Church of Ireland, and sidesmen were appointed at the same meeting. In the year 1910, and since then, the trustees had appointed three lay members of the congregation to act as a lay committee or church or chapel wardens, relying on the powers contained in the indenture of endowment, and C. P. Coote Cummins, Gilbert Archer, and John Draper, three of the plaintiffs in the present action, were so appointed for the year 1913. In the same year (1913), at a meeting of the Easter vestry, the registered vestrymen of the church, purporting to act under the regulations of the Constitution of the Church of Ireland as to the appointment of churchwardens, elected the defendant, John E. Johnston, as churchwarden for the year 1913, and at the same meeting they appointed the other defendants (excepting the defendant George Richardson) as sidesmen of the said church for the year 1913. The defendant, George Richardson, was the chairman of this meeting.

In the year 1867, the bishop of the diocese had assigned a district to the said church, and after the passing of the Irish Church Act, 1869, the church had assumed the name of the Parish Church of St. John's, Sandymount. In 1877, the church joined the Diocesan Scheme for the Diocese of Dublin, this scheme being one framed under and in pursuance of the Constitution and statutes of the Church of Ireland, and from that time the church had received a

yearly sum under the said scheme as an addition to the stipend of its minister.

The present action was brought by the minister of the church, the existing trustees, and the three persons appointed by them to act as churchwardens for the year 1913. The plaintiffs, in their statement of claim, alleged that the church had always been and now was a proprietary church, governed, controlled, and maintained under and by virtue of the powers and provisions contained in the trust indenture of the 1st April, 1850, and not otherwise, and they alleged that at no time had the said church been within the Constitution of the Church of Ireland, or subject to the control or jurisdiction of the same, nor had any act or thing ever been done by the trustees or other persons entrusted with the control or government of the said church under the said trust indenture to bring it within the jurisdiction, control, power, or government of the Church of Ireland; and they claimed—

(1) a declaration that the election of the defendant, John E. Johnston, as churchwarden, and the other defendants (save the defendant George Richardson) as sidesmen, was null and void;

(2) an injunction to restrain the said defendants from acting as such churchwarden or sidesmen;

(3) an injunction to restrain all the defendants from in any way interfering with the privileges and prerogatives of the plaintiffs, or any of them, in the control and management of the said church or the affairs thereof, or in the appointment of the officers of the said church.

The defendants, in their defence, alleged that if the church had ever been a proprietary church it had ceased to be such for forty years or more, and was now a parish church, and subject to the regulations contained in the Constitution and statutes of the Church of Ireland for the appointment of select vestry, churchwardens, and sidesmen.

Jellett, K.C., Herbert Wilson, K.C. (with them *The Hon. Cecil Atkinson*), for the plaintiffs.

Serjeant Matheson, K.C., and *Leech, K.C.* (with them *E. S. Murphy*), for the defendants.

The arguments sufficiently appear from the judgment of Barton, J.

Barton, J.
1914.

LE FANU
v.
RICHARDSON.

BARTON, J. :—

The plaintiffs in this action are the minister, the trustees, and three gentlemen, whom the trustees purported to appoint as churchwardens, of the church of St. John, Sandymount. The defendants are Mr. Richardson, the chairman of a general vestry meeting, which was held in June, 1913, under the Constitution of the Church of Ireland; Mr. J. E. Johnston, who was elected churchwarden; and six gentlemen who were elected sidesmen, at that meeting.

The action is brought to have the election of the defendant Johnston, as such churchwarden, and of the six sidesmen, declared null and void; and for an injunction to restrain them from acting as such churchwarden or sidesmen; and to restrain all the defendants from in any way interfering with the privileges and prerogatives of the plaintiffs, or with the control and management of the said church, or in the appointment of officers, or in any of the affairs thereof.

One word as to the jurisdiction of this Court in a case of this kind. The Church of Ireland is a self-governing Church, with its own Constitution, its own legislative authority, and its own tribunals. Nevertheless the temporal courts can be resorted to when complaint is made that some civil right or interest has been infringed, or that the statutory limitations which were contained in the Irish Church Act have been transgressed. That is so in the present case, in which the plaintiffs complain of an alleged invasion of the rights reserved by the Irish Church Act of 1869, and of an apprehended interference by unauthorized persons with the control of this church, the fabric, possession, and management of which are vested in, and committed to, them.

The case of the churchwarden stands on a different footing from that of the sidesmen, and must be disposed of separately.

It will be convenient at the outset to state the grounds upon which the plaintiffs have rested their case as regards the churchwarden. They may be grouped under six heads. Mr. Jellett, in his opening statement, rested his case upon three propositions, any one of which, if established, would be sufficient to entitle the plaintiffs to succeed. He contended, first, that the church

of St. John, Sandymount, was entirely outside the Constitution of the Church of Ireland; secondly, that it was at all events outside the provisions of the Constitution which provided for the holding of vestries, and the election of churchwardens; and, thirdly, that the trustees of St. John's Church, Sandymount, had an exclusive power under their trust deed of appointing churchwardens. Mr. Wilson, in his reply on behalf of the plaintiffs, submitted, fourthly, that if an elected churchwarden could be appointed by any other authority than the trustees, it would not be by the general vestry under the Constitution of the Church of Ireland, but by the proprietors of pews under the Church Building Act of 1851. Fifthly, it was contended that, if the plaintiffs failed on all these four grounds, the Constitution of the Church of Ireland did not authorize the election of a churchwarden for a church like St. John's Church, Sandymount, at the meeting at which this churchwarden was elected. Sixthly, it was contended that, owing to the form of the notice by which the meeting was convened, the election of this churchwarden was irregular.

I propose to deal with the facts of the case in historical order, and to dispose of the points to which I have alluded as they arise.

As the case is concerned with the election of a churchwarden, it is necessary to bear in mind the character of the office of churchwarden. It was an ancient office which grew up in or before the fourteenth century. The office was one upon which the law imposed duties, and conferred powers and privileges. The churchwarden was, in ancient parishes, a civil officer with duties connected with local government, and he was also an ecclesiastical officer of the Established Church, with duties inside and outside the church. He was recognized by the law as a quasi-corporation, who could hold goods and chattels, and bring actions for the parishioners. As the office grew up by custom, the mode of appointment was not always the same. There was a canon on the subject in England and Ireland which was declaratory of the common law: *Rex* v. *Salisbury* (1). It provided that two churchwardens should be chosen by the joint consent of the minister and parishioners, if they could agree, but if they could not agree,

(1) [1901] 2 K. B. 225, at p. 227.

Barton, J. 1914.

LE FANU v. RICHARDSON.

then one by the minister, and the other by the parishioners. There were many special customs, but it was characteristic of most of them that there should be two churchwardens, one nominated by the minister, and the other by the parishioners. The election to the ancient office of churchwarden was regulated in old parishes of the Established Church by the canon or customs to which I have referred; but they did not govern St. John's Church, Sandymount, which was a modern church built under a special code of statutes called the Church Building Acts.

The Church Building Acts, so far as Ireland is concerned, originated in a statute of the Irish Parliament, which was amended by a series of Acts from time to time, one of which, the Church Building Act of 1849, became law shortly before the erection and endowment of St. John's Church, Sandymount. These Acts were consolidated, two years afterwards, in an Act of 1851 (14 & 15 Vict. c. 72), which became law after the date of the deed by which St. John's Church was endowed, but before the church was completed and ready for use. The church was erected between the dates of these two Acts of 1849 and 1851.

The Church Building Acts were passed in order to cope with the inconvenience caused by the large extent of some parishes, the increase of population, the distance of churches from the houses of the inhabitants, and the consequent inconvenience of resorting to them; and by these Acts private persons were enabled and encouraged to erect and endow new churches.

These statutes were necessary in order to get rid of the restriction of the law of mortmain, and also in order to make the new churches constituent units of the Established Church of England and Ireland. By these Acts private persons were authorized to appropriate a site for the erection of a church, with an endowment for the minister's stipend, for repairs, for head rent, and for insurance. The consent of the bishop of the diocese was required at every stage of the proceeding, and the church was expressly placed under his jurisdiction. The appointment of the minister was to be vested in the trustees of the church; and the church, when erected, appropriated, and endowed, was to become a perpetual cure and benefice, and its minister was to become a perpetual curate, and a body corporate with

perpetual succession and capacity to receive in perpetuity land tenements, and other endowments. It is clear that one effect of the Church Building Acts was to make the new churches constituent units of the Established Church of England and Ireland; and in public documents, such as the reports of the Royal Commissions on the Irish Church in 1833 and 1868, they were treated as such, along with the older parishes. They differed in their conditions and their incidents from old parishes, but they were declared by statute to be perpetual cures and benefices of the Established Church.

The main difference between a new church like St. John's, Sandymount, and an old parish was, that St. John's, Sandymount, was the creature of statute, and derived whatever rights and privileges it had from statute. A new parish of this kind had no customary offices or officers, and for about sixty years from the date of the first of these Church Building Acts, the churches which were built under these Acts had no churchwardens in the official and ecclesiastical sense of that word. Their parochial organization was fixed by their trust deed, which could provide for a local committee being appointed by the trustees for managing the affairs of the church. But the endowment deed could not authorize the trustees to appoint churchwardens in the official and ecclesiastical sense of that term. No authority has been cited for the proposition that a private person could by deed authorize trustees to appoint to the ancient office of churchwarden. He might authorize his trustees to appoint officers or committee men to act in that capacity, or to discharge analogous duties, but they would not be recognized as churchwardens by any legal authority. Churchwardens had to be sworn into office, and in all legal proceedings had to prove their legal title as churchwardens, whether by custom or statute. These new parishes created under the Church Building Acts had no churchwarden, in the legal sense of that term, until 1849.

By the Church Building Act of 1849, sect. 6, it was provided that two fit and proper persons might be appointed to act as churchwardens for any church or chapel erected, appropriated, or endowed under the Church Building Acts, at the usual period of the year for the appointment of parish officers, one to be named

Barton, J. 1914. LE FANU v. RICHARDSON.

by the incumbent, and the other by the proprietors of pews. The section did not make them civil officers. I presume that the churchwardens of the mother parish were to continue to be the civil officers over the whole area of the ancient parish. But the Act conferred upon these statutory churchwardens, at all events within the church, the power and authority of churchwardens in a parish church. For example, they were given power to bring actions for pew rents and dues in the official name of churchwardens of the church, such action not to abate by death, removal, or going out of office, and their powers and duties were to continue until their successors should be admitted and sworn into office.

It will be observed that no provision was made in the Act of 1849 for the election of vestries, or for any other parochial office except the churchwarden, or for appointment of the second churchwarden in the first instance in the interval which must elapse before the pews should be let. But the latter omission was supplied in the Act of 1851.

It was shortly after the passing of this Act of 1849 that the Right Hon. Sidney Herbert took advantage of its provisions to erect and endow St. John's Church, Sandymount. The endowment was carried out by means of a lease for 150 years, dated March 31, 1850, and a deed of endowment and trust dated the following day, April 1, 1850, to which the Archbishop of Dublin was a party. The deed recited that Mr. Sidney Herbert had erected on the site in question a church at a cost of £6,000, and that he had agreed with the Archbishop of Dublin to grant a lease, and to make an endowment, so that the said church when completed and endowed should be and become a perpetual cure within the meaning of the Church Building Acts. The deed also recited that he had added the other requisite endowments for minister's stipend, repairs, rent, and insurance; that he had appointed trustees; and that he had given the church the name of the Church of St. John the Evangelist, Sandymount. Then follows a conveyance of the site, the church, and its appurtenances, to the trustees, for the term of 150 years, subject to the powers, provisions, and declarations thereinafter contained. Then follows a declaration of trust in the form of a covenant by the trustees with

the archbishop, that they (the trustees) will remain and continue jointly bound to each other under the title of Trustees of "The Church of St. John the Evangelist, Sandymount," for the trusts and purposes, and subject to the provisoes, declarations, limitations, and agreements contained in the deed and in the said Acts of Parliament—*i.e.*, the Church Building Acts.

Then follow the trusts for the application of the income of the endowment and of the pew rents, and an express trust that the liturgy and rites of the United Church of England and Ireland as by law established, and none other, shall be used and observed in the said church. Power is then given to the trustees to appoint the minister, and it is declared and agreed that, subject to the rules and regulations therein and to the lawful control of the Archbishop of Dublin, the minister shall have "the exclusive management, control, and discretion of any matter and thing relating to or concerning the said church save as herein is otherwise directed, and that he shall, subject as aforesaid, have the appointment, control, and power of removal of all and every the inferior officers and other persons from time to time employed in respect thereof."

The trustees were also to have power to regulate the amount and mode of payment of the pew rents, and to appoint a collector at such salary or percentage as they should think fit. Then comes the power, upon which the plaintiffs rely:—"And also to nominate and appoint three or more lay gentlemen who shall be in the habit of frequenting said church to act in the capacity of a lay committee or church or chapel wardens in respect of said church, and from time to time to remove them or any of them, and appoint others in their place and stead. Provided, however, that it shall be no part of the duty of said committee or church or chapel wardens to take care of the repairs of the said church or chapel or the management of the funds thereof." It will be observed that the said deed does not purport to give power to the trustees to appoint churchwardens, but to appoint three or more lay gentlemen *to act in the capacity of* lay committee men or churchwardens. The deed could not do more than that—namely, to provide a committee, who would not and could not be churchwardens in the legal sense of that term, but would act in that capacity, so far as such a committee could do so.

Barton, J.
1914.
LE FANU
v.
RICHARDSON.

There could be no real church or chapel wardens save by custom or statute. No private individual could have conferred upon trustees a power of appointing churchwardens in the true sense of that term. Besides, the statute in pursuance of which the deed was executed, and the limitations and provisions of which expressly bound the trustees, had conferred a right upon the incumbent and the pew-holders to appoint churchwardens, which the deed could not affect. The lay committee were not to be less than three, and might be twenty or fifty. The trustees did not set up a claim to appoint churchwardens under this power. On the contrary, they took the first opportunity of showing that they clearly understood their position. Before the church was completed and ready for use, the consolidating Act of 1851 became law. This Act, in section 27, re-enacted, with some variations, the provision enabling the incumbent and pew-holders to elect two churchwardens, and also gave the trustees power to appoint them in the first instance until the pews were let. Accordingly the trustees, having to provide for the interval which must elapse until the pews were let, appointed two churchwardens under this section.

I stop here to observe that this consolidating Act, at the end of sect. 2, provided that in future endowments of proprietary churches, unless otherwise provided in the deed of endowment, the church property should be vested in the incumbent, churchwardens, and their successors for ever ; showing that, although the section providing for the election of churchwardens may have been merely permissive and not mandatory, the Act contemplated churchwardens being appointed generally, if not universally, because it provided that where the deed of endowment did not otherwise provide, the property was to be held by the incumbent and by the churchwardens to be appointed under the Act.

I agree with every word that Mr. Jellett said upon the subject of powers in the nature of trusts, or accompanied by a duty. They cannot be released or abandoned or lost by non-user. This power to appoint a lay committee has never been lost or abandoned. It has been used recently, and may usefully be used again at any emergency. But it was not, and could not be, a power to appoint churchwardens in the real sense of that term, that is to say, church-

wardens as known and recognized by the law, and there was no power to appoint such officers in connexion with this church down to the passing of the Irish Church Act, except under the statute in pursuance of which and subject to which this whole trust was created.

This was the view upon which the original trustees, one of whom was Mr. Sidney Herbert himself, acted; and they and their successors continued to act on that basis down to 1870. For twenty years, year after year, churchwardens were appointed at Easter under the powers in the Act, one by the minister and the other by the pew-holders.

One incident happened in connexion with the church before 1870. The then Archbishop of Dublin, in pursuance of powers conferred by the Church Building Acts, executed a deed, dated November 6th, 1867, by which he assigned a district to the new church, and ordained that the district thereby assigned should be made the immediate cure of the incumbent or curate for the time being licensed to serve the said church, so far as regards visitation of the sick and other pastoral duties, and determined that the rites of Baptism, Confirmation, Churching, and the Holy Sacrament of the Lord's Supper, should be solemnized in the said church, with a proviso, usual in such cases, that the rector of Donnybrook should not be discharged from the cure of souls or other parochial duties in such district, but that the said cure of souls should remain as theretofore. I agree with Mr. Wilson that this assignment of a district did not make this church a district parochial church, which is an altogether different kind of church, created under different sections, to meet a different want, and with different incidents. For example, the incumbent of the mother church has the patronage in the case of district parochial churches. I must add, however, that I do not think it is material whether this was a district parochial church or not. I think it was not. It was, and remained down to 1870, a proprietary and trustee church, with a district assigned to it, and was a perpetual cure of the Established Church of England and Ireland.

We now come to the Irish Church Act of 1869. That Act dissolved the union between the united Churches of England and Ireland, and declared that the ecclesiastical law of Ireland was no

Barton, J. 1914. LE FANU v. RICHARDSON.

longer to subsist as law, but was to subsist in future as contract binding on the members for the time being as if they had mutually agreed to abide by and observe the same; and the Act expressly enacted that, in the manner and to the extent therein provided, this contractual ecclesiastical law should be capable of being enforced in the temporal courts in relation to all property reserved or given under the Act.

By section 19, all laws prohibiting the holding of synods or conventions were repealed, and it was enacted that nothing in any Act or custom should prevent the bishops, clergy, and laity of such Church from meeting in general synod or convention and passing constitutions and regulations for the general management and good government of the said Church and the property and affairs thereof, and the future representation of the members thereof in diocesan synods, general conventions, or otherwise.

Accordingly, the Church of Ireland was empowered to modify the ecclesiastical law which was contractually binding upon its members, and there was, in my opinion, nothing to prevent the general synod legislating upon such a subject as the mode of election of churchwardens of proprietary churches, except in so far as their powers were restricted by the other provisions of the Act.

This brings me to section 70, which saves certain rights as to proprietary churches and chapels of ease. The fact of the insertion of such a saving clause indicates that these proprietary churches come within the Act, and are subject to the legislative power of the general synod, save in so far as they are saved by this section. The section saves four rights. It provides that nothing in the Act contained shall affect—(1) the patronage or right of presentation to any proprietary church; (2) the property of such church; (3) the property held for the purposes of or appropriated to the use of the same; or (4) the continuance of the trust relating thereto as originally constituted.

The only one of these four saving provisions which has been relied upon in the present case is the last, namely, the saving of the continuance of the trust relating to the church. It is true that this provision saves the power of the trustees to appoint a lay committee who might, if necessary, act in the capacity of church-

wardens, but I have already given my reasons for thinking that, before the passing of the Irish Church Act, real churchwardens could never have been appointed under that power.

This brings me to Mr. Wilson's argument on this branch of the case. He referred to the sections of the Church Building Acts which gave the power of electing churchwardens to the pew-holders of the church, and he contended that the power remained with the pew-holders still. He did not contend that the synod had no power to modify the provisions of the Church Building Acts, but he argued that this particular power was preserved by section 70 of the Irish Church Act. He pointed out that the trustees of the deed are, under the declaration of trust already referred to, bound together for the trusts and purposes and subject to the provisoes, declarations, and limitations which are contained in the Act of Parliament, and he submitted that the power of the pew-renters to elect a churchwarden was a trust contained in the Act of Parliament which was incorporated in the endowment deed, and was therefore preserved by section 70 as a trust relating to the church as originally constituted. But I cannot regard that power as coming under the word "trusts" in that passage in the deed. It rather comes under the words "provisoes or limitations" subject to which the trustees are bound together. The election of churchwardens by the incumbent and pew-holders imposed no duty on the trustees, and gave them no authority. On the contrary, it was a limitation on their control, which was imposed by the Church Building Acts. I cannot regard the power of the pew-holders to elect a churchwarden as coming within any of the words of the saving clause.

Accordingly, I am of opinion that the general synod had power to regulate the mode of electing churchwardens of proprietary churches, and to change the method of election prescribed by the Church Building Acts, and also that they had power to apply to proprietary churches the system of holding vestries, although the powers of these vestries would be controlled and limited by the trust deed, which gave to the trustees or the incumbent some of the duties usually assigned to general vestries, and most of the duties usually assigned to select vestries.

Having come to the conclusion that the general synod had

Barton, J. 1914. LE FANU v. RICHARDSON.

authority to regulate the election of churchwardens in proprietary churches and to apply to them the vestry system, and that nothing in section 70 of the Church Act debarred them from doing so, I come to the next question—Did the general synod in fact do so?

When the general synod met in 1870, they framed a Constitution, which dealt with parishes and parochial organizations in clauses 63 to 79 of Chap. I. In section 63 it was provided that in every parish, as thereinbefore defined, there should be two churchwardens taken yearly from the registered vestrymen thereof, to be appointed at the Easter vestry, one by the clergyman, and the other by the registered vestrymen; and sects. 64 to 70 provided for the qualification of vestrymen, and for the settlement and revision of the register of vestrymen.

Did these sections apply to St. John's Church, Sandymount? That question depends on the definition of parish, and also upon the qualifications which were required for a registered vestryman.

In s. 35, it had been provided that the word "parish" should include not only parishes and parochial districts, but also every church or chapel under the charge of a clergyman specially licensed therefor, except where the context was inconsistent with such meaning, or where otherwise expressly provided. That definition includes St. John's Church, and there is no express exclusion of such a church from the section dealing with parishes and parochial organizations. The question remains, is there anything in the context inconsistent with its inclusion? On the contrary, section 63 specially provides that the word "churchwarden" shall be deemed to include chapelwarden, which was the name applied to these officers in the Church Building Act of 1851, and section 65 gives a special form of declaration for a vestryman in the case of a church or chapel not being a parish church, or a district parochial church. In my opinion, these sections of the original Constitution were intended to apply and did apply to such a church as St. John's Church, Sandymount, and enabled such a church to have a vestry convened and to have churchwardens appointed under the Constitution.

Sections 67 to 70 provide for the settlement and revision of the register of vestrymen; and, as I have just pointed out,

section 65 gives a special form of declaration to enable a vestryman to be registered for a church or chapel not being a parish church or a district parochial church.

This was the construction put upon the new constitution by all parties concerned, and it appears from the minutes that after the passing of the Church Act the clergymen and parishioners took legal advice as to their position. For forty years, from 1870 to 1909, all parties concerned—trustees, incumbent, vestrymen and pew-holders—acted upon this view of the law.

I do not say that it was not lawful for pew-renters to continue to elect a churchwarden. I do not know whether they have done so in any place. I express no opinion whatever upon that question. One enabling enactment does not necessarily displace another. It is not necessary for me to discuss that question, which does not arise in this case.

Mr. Le Fanu himself never disputed the authority of the Easter vestry, nor their right to elect a churchwarden and synodsmen. It is true that he always maintained that the select vestry's powers in connexion with the church were limited. That was quite true, having regard to the powers which the trust deed conferred upon him and upon the trustees. But he did not, as I understand his evidence, question the legality of the existence of either vestry, but merely the extent of their powers.

I entirely agree with the proposition that no amount of practice or disuse can get rid of a positive enactment; but as Lord Hatherley said in *Herbert* v. *Purchas* (1), "Contemporaneous and continuous usage is of the greatest efficacy in law, for determining the true construction of obscurely framed documents." I cannot say that I think the Constitution in itself ambiguous on this point, but in so far as it is ambiguous, I think that forty years' continuous user, acquiesced in by all persons concerned, affords powerful support of what seems to me to be the natural construction of the language of the Constitution, taken in connexion with the language of the trust deed.

It was found soon after the passing of the first Constitution of the Church of Ireland, that there was a weak spot in the

(1) L. R. 3 P. C. 605, at p. 650.

Barton, J. 1914. LE FANU v. RICHARDSON.

parochial organization. The parochial machinery hinged to a large extent upon the election of churchwardens at the Easter vestry, but no provision was made for the event of a neglect to hold an Easter vestry, or to appoint churchwardens at the Easter vestry. Accordingly, in the session of 1873, Chapter VI provided that in such event the bishop should require a vestry to be held and churchwardens to be appointed, and in default should have power himself to appoint churchwardens. A saving clause was added that "Nothing in this Act contained shall be held to include or affect proprietary churches or those coming within the provisions of the Irish Church Act, 1869, sect. 70, or the right or power of appointment vested in trustees of such churches."

The effect of this saving clause was to exempt St. John's Church, Sandymount, from the coercive power of the archbishop in the event of default in calling a vestry or appointing churchwardens. I do not think that it is to be inferred that the synod thought they had no power, or admitted that they had no power, to apply this statute to proprietary churches. As Lord Hatherley pointed out in *Fitzgerald* v. *Champneys* (1), "a saving clause is never a safe ground for determining the construction of any Act of Parliament." This is on account of the anxiety which there is on the part of so many people to procure a saving clause, and the readiness which there is to take the line of least resistance in legislation. It was open to the Constitution of the Church to recognize churchwardens appointed by trustees of proprietary churches. I express no opinion upon the question whether they have done so, or if so, to what extent they have done so. No such question arises here in so far as St. John's, Sandymount, was concerned. St. John's Church came within the terms of the Constitution, and the Constitution was availed of. The vestry was always called, and the churchwardens were always appointed at the vestry.

I pass over, as irrelevant, several events, such as the further grants in 1884 and 1893 by the Earl of Pembroke of plots of ground for a parochial hall, and for a vicarage; the grant of his fee-simple reversion in the site and buildings, followed by the

(1) 2 J. & H. 31.

solemn consecration of the church by the archbishop in 1872; and the award of the Archbishop of Dublin and Dr. Ball, when litigation pending between the mother church at Donnybrook, and St. John's Church, Sandymount, was referred to them as arbitrators. These events, and the circumstances which accompanied them, do not harmonize with the present attitude of the plaintiffs, but I cannot see that they materially affect the legal questions.

I must, however, refer to the Trustee Churches (Ireland) Act, 1884. That was an Act to enlarge the 70th section of the Church Act of 1869. It empowered trustees of proprietary churches to transfer Church property to the Representative Church Body, either on the existing trusts, or upon modified trusts, as provided therein. There is, in the fourth recital, a sentence which suggests that there was some doubt as to the power of the Church Synod to alter provisions of the Church Building Acts. But the passage must be read *propter subjectam materiam*. The first recital in the preamble to the Act shows that the Act was solely aimed at enlarging section 70 of the Act of 1869, and it was only with reference to matters coming within that section that the doubts in question could arise. I have already given my reasons for thinking that the power given to the incumbent and pew-holders under the Church Building Acts to appoint churchwardens, cannot be regarded as a trust which is preserved by section 70.

In 1909 there was a codification of the Constitution of the Church of Ireland, in chap. 3 of which the question of parochial organization was dealt with. In sect. 1 of chap. 3 there was a different definition of the word "parish" from that in the original Constitution. Under this definition the word "parish" included every church "in which a beneficed or licensed clergyman of the Church of Ireland officiates, and in which there shall be a register of vestrymen duly qualified as herein provided." That definition included St. John's Church, Sandymount, in which there was, and had been for years, a regular register of vestrymen. The Constitution of 1909 re-enacted the former provisions of the original Constitution which enabled a vestry to be summoned, and churchwardens to be appointed to all parishes; but the three sections 4, 5, and 6, which give the bishop coercive jurisdiction to convene a vestry, and, if necessary, himself to appoint churchwardens, were

Barton, J. 1914.

LE FANU v. RICHARDSON.

declared by sect. 7 not to affect proprietary churches, or those coming within the Irish Church Act, 1869, sect. 70, or the right of appointment vested in the trustees of such churches.

In that year differences arose, in connexion with St. John's Church, between the clergymen and some of the congregation, and the churchwardens appear to have been on the side of the clergyman. Neither the clergyman nor the churchwardens summoned the Easter vestry, and, as a result, several of the parochial activities came to a standstill. There could be no revision of the register of vestrymen. There was no body qualified to elect synodsmen. There was no body qualified to choose a select vestry, and there were no official churchwardens in the official and ecclesiastical sense. The trustees purported to elect three gentlemen as churchwardens under the power in the endowment deed, to which no resort had been made during the sixty years' existence of the church.

It is hardly likely to be a coincidence, that the general synod proceeded to strengthen their hands in reference to the holding of vestries, and the revising of the register of vestrymen. This was by means of a statute amending the Constitution, which was passed on 20th April, 1912.

The synod did not touch the coercive power of the archbishop to convene a vestry, and, if necessary, appoint a churchwarden. They left that power alone, with the saving clause in favour of trustee churches, but they amended section 2 of chapter 3, which was a general section, and they gave to the diocesan council a general and unrestricted power, which was applicable to all churches, including proprietary churches, to convene a vestry in such a manner as the diocesan synod might appoint, and to provide for the time and place of meeting, and the appointment of a chairman, and for the transaction of all such business, and the performance of all such functions thereat, as are proper to be transacted and performed at an Easter vestry. They also provided for the revision of the register of vestrymen.

It was contended that this amendment of sect. 2 was inapplicable to proprietary churches, because the diocesan council was to exercise its coercive jurisdiction within one month after the archbishop had required a vestry to be convened, and sect. 4, which

for another purpose provided for the archbishop convening a vestry, was made inapplicable to churches like St. John's Church. I cannot agree with that contention. I think the two sections are independent of each other.

I am also of opinion that this amended section was not *ultra vires*, and did not infringe sect. 70 of the Act of 1869. It did not affect the continuance of any of the trusts of the deed of endowment, but only regulated in an amended way a branch of parochial organization.

There remains the question whether the election of churchwardens at the general vestry was vitiated by the form of the notice issued by the diocesan council convening the meeting, which only named two purposes of the meeting, namely, the election of a select vestry and of synodsmen. The diocesan council had, in my opinion, no power under the Constitution to limit the business of the meeting. The Constitution directed the diocesan council to convene a vestry for the transaction of all such business and the performance of all such functions as are proper to be performed and transacted at an Easter vestry. This duty did not come within sect. 21 of Chap. III, which provides that the diocesan synod shall define the powers and duties of the vestry in all matters not herein prescribed, because this was a matter prescribed in section 5 of the chapter. The duty of the diocesan council was a mere ministerial duty of convening the vestry and providing for the performance and transaction of all its proper business and functions. If a convening authority which is invested with a mere ministerial duty to convene a body of persons could nullify a meeting by issuing an unauthorized agenda paper, limiting the business to be transacted at the meeting, the lawful proceeding of all public and private bodies might be rendered nugatory by the mistaken or wilful act of a secretary or clerk. I must add, however, that I feel doubtful whether this is not a question for the domestic forum rather than for this court. If so, my opinion would not bind the domestic tribunal.

I am therefore of opinion that, so far as the election of a churchwarden is concerned, the election was lawful, and the action should be dismissed.

Barton, J. 1914. LE FANU v. RICHARDSON.

There remains the question of the six sidesmen—perhaps not an unimportant question from a practical point of view, because the sidesmen have been spoken of as something like the police of the church. Perhaps that is why the old law of the Church did not allow sidesmen to be appointed by the parishioners against the will of the clergymen. The canons dealing with the matter provided that sidesmen were to be chosen by the minister and the parishioners if they could agree; and, if they could not agree, by the bishop. In the case of a new statutory church like St. John's, Sandymount, the canons do not help us.

Sidesmen stand on quite a different footing from the churchwardens, because no power was given to appoint sidesmen in the Church Building Acts, and they are not mentioned anywhere in the trust deed, or in the Constitution of the Church of Ireland.

Serjeant Matheson relied upon the fact that sidesmen have been elected for this church at the Easter vestry for more than forty years, and submitted that this practice constituted a valid and binding custom. The rule that a long-continued practice may be relied upon for the purpose of construing an ambiguous statute or document, does not apply, because sidesmen are not mentioned in the statute or in the trust deed. The argument was an entirely different one, namely, that forty years' practice has created a binding custom. There are two answers to that argument. In the first place, no binding custom could arise in the case of a modern statutory church of this kind. In the second place, if it could arise, there is no instance in the whole course of the forty years of the vestry appointing sidesmen without the concurrence of the clergyman. Mr. Leech argued secondly, that, although sidesmen are not mentioned in the Constitution of the Church, the combined effect of chapter 3 of the Constitution and of the rules of the diocesan synod, is to assign the election of parochial officers to the Easter vestry, and that sidesmen come under the general term "parochial officer." Perhaps that may be so in the case of an old parish church. I express no opinion. But in the case of a modern statutory church, I do not feel at liberty to come to that conclusion. It is possible that sidesmen, being ancient, customary officers of a parish, may come within the words "parochial officer" in the Constitution and the diocesan rules. But as neither custom

nor statute has made sidesmen parochial officers in a modern statutory church of this kind, I do not think I can read the general words "parochial officer" in the diocesan council's rules as including sidesmen in a church of this kind.

I assume, without expressing any opinion on that point, that the synod have power to provide for the election of sidesmen in a church of this kind. But I cannot find that they have done so. The trust deed, on the other hand, gives the trustees power to appoint a lay committee, and the incumbent power to appoint all inferior officers, and I think that in one or both of these ways persons might be appointed who, although not sidesmen in the ancient official sense of that word, could do the work of sidesmen, until and unless the synod, assuming that it has power to do so, provides for the case.

I can find no authority in the Easter vestry to appoint these sidesmen, and so far as they are concerned I think the action should succeed.

Accordingly the action will be dismissed in so far as it seeks a declaration that the election of John E. Johnston as parishioners' churchwarden is null and void, and in so far as it seeks an injunction against the said John E. Johnston. There will be a declaration that the election of the other defendants (save George Richardson) as sidesmen by the vestry held on the 24th June, 1913, was null and void, and an injunction to restrain the said defendants from acting as sidesmen of the said church.

With regard to the question of costs, the plaintiffs will have their costs of the action so far as those costs relate to the question of the appointment of sidesmen, and the defendants will have their costs so far as those costs relate to the appointment of churchwarden. That involves an apportionment of the general costs. It may be of assistance to the Taxing Officer to add that so far as the hearing was concerned the time occupied by the discussion of the issue as to the sidesmen was not more than one-sixth of the whole, and that the remainder of the hearing was occupied by the discussion of the issue as to the churchwardens. That observation applies solely to the hearing. I express no opinion upon any other branch of the costs.

R. W. L.

Appeal.
1914.

LE FANU
v.
RICHARDSON.

The plaintiffs appealed from so much of the order of Barton, J., as dismissed with costs the prayer for a declaration that the election of John E. Johnston as churchwarden was null and void and for an injunction to restrain the said defendant from acting as such churchwarden (1).

Jellett, K.C., and *Herbert Wilson, K.C.* (with them, the *Hon. Cecil Atkinson*), for the plaintiffs :—

This church stands in an entirely different position from the ordinary or parish churches, because the control of the church funds, the payment of the minister's salary, the appointment of churchwardens and inferior officers and all other persons employed about the church is given either to the trustees or to the minister. The machinery therefore differs entirely from that applicable to the analogous matters in parish churches. In addition, the funds of the church come from a different source, and the minister is appointed by a different class of people. The control of the church is regulated by a code of its own, partly to be found in the deed of endowment, and partly in the statutes in pursuance of which the endowment was made; and this is an important matter to bear in mind, because of the fact that the judge in the Court below decided that this church must have what may be called a common-law churchwarden, and that the appointment of the defendant (Mr. Johnston) was valid; and also that the church came within the provisions of the Irish Church Act, 1869. We submit that not only do we not require common-law churchwardens, but we could not have them. The class of official or officer that we should have in respect of a church of this kind is of a different character from a common-law churchwarden; he has not got the extended powers of a common-law churchwarden; it is not necessary he should have, nor indeed could he have, such powers. The principal statutes applicable to the case that were in force at the date of the deed of endowment were three :—first, 6 & 7 Wm. 4, c. 31, which gave power to private persons to allot

(1) In the Court of Appeal, before O'BRIEN, L.C., PALLES, C.B., and HOLMES, L.J.

lands and erect churches, or chapels thereon, and settle specified sums for the payment of the ministers; secondly, 3 & 4 Vict. c. 101, which provided that in addition to the fund for the payment of the minister of any such church, there should also be a fund provided for the payment of the repairs; and thirdly, 12 & 13 Vict. c. 99, which for the first time contained an enactment dealing with the power to appoint churchwardens in these proprietary churches. Sect. 6 provided "that two fit and proper persons may be appointed to act as churchwardens for every church or chapel erected, appropriated or endowed, under the provisions of this or any other Act for the encouragement of the building of churches or chapels in Ireland . . . at the usual period in every year for the appointment of parish officers, one of such churchwardens to be named by the incumbent or minister of such church or chapel and the other by the proprietors or holders of pews in such church or chapel; and such churchwardens when so elected, admitted, and sworn as in other cases of churchwardens of parochial churches shall have authority within the said church or chapel, and any district legally assigned thereto or connected therewith as in the case of a parish or parochial church is lawful and usual for the churchwardens thereof." Three points are to be noted about that section: first, it is an enabling section—the two fit and proper persons *may be* appointed; secondly, there is a distinction drawn on the face of the section itself between the particular class of church with which it is dealing, namely, proprietary churches, and the other class of church referred to in the section as parish or parochial churches; thirdly, the words are "may be appointed *to act as churchwardens*," not "may be appointed *to be* churchwardens." There was, prior to these three Acts, an old Irish Act. In the year after the deed of endowment was executed, the 14 & 15 Vict. c. 72, was passed, which consolidated these Acts, and gave power to the bishop of the diocese to appoint districts to these proprietary churches, and in 1867 a district was appointed to the Church of St. John, Sandymount. The defendants rely on that fact as making this a parish church within the meaning of the statutes and Constitution of the Church of Ireland. The principle of the decision in the *Dunlewey Benefice*

Appeal. 1914. LE FANU v. RICHARDSON.

Case (1) shows that this contention is not sound in law, for the 70th section of the Irish Church Act, 1869, preserves the "trust" as originally constituted for these proprietary churches. The statutory power given to the minister and pew-holders by sect. 6 of 12 & 13 Vict. c. 99, to appoint churchwardens is a trust incorporated in the deed of endowment, for, in the declaration of trust, the trustees are all bound together for the trusts and purposes, and subject to the provisoes, declarations, and limitations in the Acts of Parliament therein recited. That trust is, therefore, preserved by sect. 70 of the Irish Church Act, 1869. The only way in which the constitution of the Church of St. John, Sandymount, could be altered would be under the provisions of the Trustee Churches (Ireland) Act, 1884, by a unanimous resolution of the trustees (sect. 4), and there is no such resolution. The preamble to this statute makes it perfectly plain that without such a resolution the general constitutions and regulations of the Church of Ireland for the management and good government of churches, their property and affairs, do not apply to proprietary churches, for the statute recites—"Whereas it is desirable that the trustees and patrons of such churches and chapels *should be authorized to adopt and apply* to such churches and chapels such of the aforesaid provisions and regulations as may, in their opinion, be best adapted to carry out the original intention of the trusts of such churches or chapels," and the statute proceeds to prescribe the mode in which that may be done. Therefore we submit that none of those regulations of the Church of Ireland touching the appointment of vestries and churchwardens apply to proprietary churches. There is no statute that requires them to have churchwardens, but the trustees have power to appoint wardens as provided in the trust.

Serjeant Matheson, K.C., Leech, K.C. (with them *E. S. Murphy*), for the defendants:—

We submit that there is no trust at all in relation to the appointment of churchwardens. The power to appoint churchwardens in these proprietary churches is a statutory one conferred by the 6th sect. of 12 & 13 Vict. c. 99, which enables two persons

(1) Bernard's Reports of Leading Cases under the Irish Church Acts, p. 88.

to appoint them, namely, the minister and the seat-holders. It is important to remember that this Act was in force at the date of the deed of endowment of St. John's, Sandymount. The 14 & 15 Vict. c. 72, repeals this Act, but sect. 27 contains provisions almost identical. Sect. 44 of 7 Geo. 4, c. 72, provides that vestries shall be called and holden in Easter week in every year in every parish and chapel in Ireland for the election or nomination and appointment of churchwardens; therefore we submit there is no trust as to the appointment of churchwardens. By sect. 12 of the Irish Church Act, 1869, all the property, both real and personal, belonging to or appertaining to any benefice was vested in the Commissioners, except as reserved in sect. 70, and the definition of "benefice" contained in sect. 72 includes proprietary churches; in fact, they are called benefices in sect. 23 of the Act; we submit, therefore, that this sect. 12 swept all the property of St. John's, Sandymount, into the Commissioners. The 6th sect. of 12 & 13 Vict. c. 99, gave the churchwardens of these proprietary churches rights almost equal to those of common-law churchwardens. They have duties in respect of the property; for example, they are to attend to the repairs of the church; consequently, since the property is in the hands of the Commissioners, and the power to appoint churchwardens who have duties in respect of that property is the creature of statute, we say such churchwardens must now be appointed in accordance with the Constitution of the Church of Ireland made under the powers of the Irish Church Act, 1869. We submit that the plaintiffs here have no power or right of appointment of churchwardens; therefore their action must fail, for no right of theirs has been infringed, and so far as the present action is concerned, it is immaterial to consider whether Mr. Johnston has been regularly appointed or not, or whether the power of appointing the churchwarden rests with the seat-holders or with the vestry. The important question really is:—Can the rights of the laity which are preserved by the Act of 1869 be swept away by any body of trustees or by any clergyman who say they are outside the Constitution of the Church? If there is no vestry, there can be no synodsmen, and no representation in the general synod. Sect. 19 of the Act of 1869, unless it is cut down in this respect by sect. 70, gives

Appeal. 1914.

LE FANU v. RICHARDSON.

absolute power to make regulations for the good government and management of every church or chapel in the Church of Ireland; and sect. 20 not only enables the ecclesiastical law to be modified, but makes it binding on all the members of the Church as if they had mutually contracted and agreed to abide by it. The synod have power to alter any part of the ecclesiastical law; they could alter the Church Building Acts, for they are part of the ecclesiastical law. Sect. 70 deals with four matters, viz.:—(1) patronage of proprietary churches; (2) property of such churches; (3) their funds; and (4) the continuance of the trust relating thereto. The "trust" referred to in this section is a trust relating to the patronage, property, or funds of the church, and has nothing to say to the questions raised in this action, which relate to the good government and management of the church—matters dealt with in sect. 19.

Jellett, K.C. (in reply):—

The distinction between doctrine and administration must be kept in mind. Sect. 19 deals with administration, sect. 20 with doctrine. The deed and the Building Acts provide that the doctrine shall be the doctrine of the Church of Ireland, but while doctrine is the same, administration may be totally different. This is a "proprietary" church, and is not within the definition of benefice. The word "proprietary" does not even occur in that definition. Shortly, our argument is—(1) The trust as originally constituted is to be found in the deed of endowment and the Church Building Acts, and the method of appointing churchwardens is part of that trust. (2) That trust is exempted by section 70 from the scope of the Act of 1869. (3) It follows, therefore, that no provisions in the Constitution can interfere with the continuance of that trust as originally constituted. (4) The provisions of the Church Building Acts have not been, and could not be, repealed by the Synod. (5) The Trustee Churches Act, 1884, provides the only legislative and legal machinery by the adoption of which the continuance of the trust as originally constituted could be interfered with. (6) If any Constitution did interfere with the trust as originally constituted, it would be

ultra vires. (7) The appointment of the defendant, John E. Johnston, as churchwarden, is a direct interference with the affairs and property of this church. (8) If his appointment is held to be valid, it will let loose in this church two conflicting authorities deriving their power from different sources and appointed to perform precisely the same duties, and that is contrary to the continuance of the trust as originally constituted, and is in direct contravention of the Constitution itself, which never contemplated two sets of people doing the same thing.

Cur. adv. vult.

May 18.

O'BRIEN, L.C. :—

In this action the plaintiffs seek a declaration that the defendant, John E. Johnston, was not lawfully elected to the position of churchwarden of the church of St. John, Sandymount, and for an injunction to restrain him from acting as such. A similar declaration was prayed in respect of the election of other defendants as sidesmen, but this part of the action has been disposed of by Mr. Justice Barton, and is not before us. The principal plaintiffs are the present trustees of a deed of trust, dated the 1st April, 1850, regulating the property and certain affairs of this church in conformity with the provisions of the Church Building Acts which existed at the date of the execution of the deed, now replaced by the 14 & 15 Vict. c. 72. Three of the plaintiffs claim as having been elected under the provisions of the deed as churchwardens or as members of a committee having similar powers. In the view which I take of the case it is sufficient to say that the trustees are proper plaintiffs.

The statement of claim and the arguments at the Bar extended over a wide field of discussion. I propose to confine myself to a very much narrower issue, but one I conceive sufficient to decide the action.

Prior to the passing of the Irish Church Act, 1869, churches of this class were regulated by the statute I have referred to, viz., 14 & 15 Vict. c. 72. The earlier statutes, consolidated and amended by this one, contained similar provisions to this Act of Parliament, enabling private individuals to endow

Appeal. 1914.

LE FANU v. RICHARDSON.

O'Brien, L.C.

non-parochial churches and chapels, but I attach no importance to verbal differences, and, in my judgment, for simplicity I treat this Act of 1851 as being the ruling enactment, ignoring the actual date. To these churches or chapels districts might be assigned, and by various sections the patronage in connexion with them is preserved in private hands, to whom also was committed the management of the finances of the church or chapel, its preservation and repair, and certain powers of management not clashing with the general discipline of the then Established Church. These powers were to be exercised by trustees, and might be incorporated, with or without modifications, into the trustee deed. This is a sufficiently accurate summary for my purpose.

Section 27 of the Act of 1851, which was the section in force in 1869, enabled churchwardens to be appointed in respect of this church, and without this statutory power such officials could not be appointed. Under it, after the first appointment, one churchwarden was to be appointed by the holders of pews, the other by the incumbent.

The deed of trust of St. John's gave power to the trustees to nominate three or more lay gentlemen to act as a "lay committee or church or chapel wardens." These, I think, it is clear would not be churchwardens in the strict sense—they would be neither common-law churchwardens, who could not exist in connexion with this church, nor statutory churchwardens, the only class of official of that name that could be appointed. The material clause in the deed of trust, so far as the present action is concerned, provides that the trustees should "be and enter, remain, and continue associated with and jointly bound to the other and others of them . . . for the trusts and purposes and subject to the provisions, declarations, limitations, and agreements herein, and in the said Acts of Parliament hereinbefore in part recited, in that behalf mentioned and declared."

These statutes were the Church Building Acts existing at the date of the deed; but, as I have said, I am entitled to assume that the consolidating Act equally applies. Whatever provisions existed at the date of the passing of the Church Act regulating this matter of appointment of churchwardens were not in terms

repealed ; but it has been argued either that they were impliedly repealed by that statute, or that the general body of the new Church acquired a dominant jurisdiction to vary or annul them ; and the defendants' case is shortly that the statutes and Constitution of the Church of Ireland do override all provisions previously existing for the appointment of churchwardens in such a case, and that Mr. Johnston has been regularly elected churchwarden under this Constitution.

Section 12 of the Church Act, if it stood alone, I will assume would have had the effect of divesting all property in connexion with churches like St. John's from the trustees ; but sect 70 unquestionably would prevent such a result. The defendants, however, contend that while the property of "proprietary churches," as they are called in the section, are retained to the trustees in each case, yet by force of section 19, or sections 19 and 20 combined, the powers given to pew-holders to elect churchwardens, and to trustees to elect lay committees to discharge like duties, are not preserved by sect. 70, and may be altered or abrogated by Church legislation.

I think that the expression "trust relating thereto," in sect. 70, cannot be confined merely to property, and that both in popular and legal language it includes all powers contained in the deed of trust either directly or by incorporation from the Church Building Acts ; and I also think that plaintiffs' counsel have rightly insisted on the effect to be given to the use of the word "trust," and not "trusts," in this section. The word "trust" must be read, not in relation to property, but to the church or chapel mentioned in the beginning of the section, and trust must include, I consider, powers, as well as the more limited subject-matter, namely, trusts relating to property. The section, I think, was intended to preserve in respect of proprietary or quasi-private churches all the lawful privileges and powers of management which had previously been vested in private hands. Neither before nor after the Church Act was there any doctrinal difference existing in respect of these churches between them and other churches of the Established Church before the Act, or between them and the Church of Ireland after the Act. Sect. 20 of the Act undoubtedly vests Church control in respect of doctrines, rites,

Appeal. 1914. LE FANU v. RICHARDSON. O'Brien, L.C.

and other matters connected therewith, in the general body of the Church to be newly constituted, but I do not think that sect. 20 deals with a matter such as this; and as to sect. 19, I consider it to be in this respect controlled by the saving in sect. 70.

I should have arrived at this conclusion on the construction of the Act of 1869 alone, but I think that a consideration of the Trustee Churches (Ireland) Act, 1884, leaves the matter without doubt.

This Act recites sect. 70 in full, and it recites the portion of sect. 19 giving power to frame Constitutions for the general management and good government of the Church and the property and affairs thereof.

Leaving the rest of the recitals for the moment out of consideration, the enacting part enables the trustees by a unanimous resolution to transfer the whole of their trust to the general body of the Church, and sect. 4 expressly includes "affairs" as well as property. If I be right in my view of sect. 19 and sect. 70, this is exactly what one would expect to find; and the fact that a unanimous resolution is necessary shows how jealously the transfer of the trust, used as I understand it, is regarded. Going back to the preamble, great stress was laid on the recital dealing with the matter of alleged doubt with regard to the powers conferred by the Church Act, but careful consideration of the text satisfies me that the doubts are not doubts as to whether sect. 19 had or had not given an over-ruling power to the general body of the Church, but doubts whether the trustees could take advantage of ordinances which had been made, and which regulated the ordinary non-proprietary churches of the Church of Ireland. This is a very different matter, and in a case like the present, where the trustees never, either before or since 1884, purported to get rid of their trust, the Act of 1884 must have, in this matter of the construction of the Act of 1869, vital and coercive force in favour of the contention, which I consider right, that this proprietary church in the matter of the appointment of churchwardens is still regulated by the provisions of the Church Building Act which forms part of the general trust, and that it could not be, in my judgment, overruled by the general statutes of the Church of Ireland, save of course in the manner provided by the Act of 1884.

It follows that the plaintiffs are entitled to the declaration which they seek, and I express no opinion as to whether in addition to churchwardens appointed under the section there could also be a lay committee appointed under the deed who are not churchwardens in any sense.

I also express no opinion upon any of the other interesting questions discussed, *e.g.* the power and jurisdiction with regard to the appointment of vestries; the true construction of the statutes of the Church of Ireland; or anything outside the one narrow issue which, I think, decides the action.

PALLES, C.B.:—

Of the many questions discussed during the hearing of this appeal, I propose to express an opinion upon one only, viz., the effect of section 70 of the Irish Church Act, 1869, upon the right to appoint Mr. Johnston as churchwarden of the Church of St. John the Evangelist, under the provisions of the present constitution of the Protestant Episcopalian Church in Ireland. The determination of this question, in the view I take of the case, is sufficient to decide the appeal.

The words of that section, so far as they are material, are the following:—"Nothing in this Act contained shall affect the patronage or right of presentation to any proprietary . . . . church . . . or affect the property in any such church . . . or the property held for the purposes of, or appropriated to the use of, *the same*, or affect the continuance of *the trust relating thereto* as originally constituted."

There has been some controversy during the argument as to that to which "thereto" in this clause refers. In my opinion, it is plainly "church." "Relating thereto" means relating to "the same," the last antecedent, and in this context "the same" means "church."

The meaning of the words in the section, material here, is "shall not affect the trust relating to the church as originally constituted."

Mr. Justice Barton, in his judgment, refers to an expression

Appeal. 1914. LE FANU v. RICHARDSON. Palles, C.B.

of Lord Hatherley, when Vice-Chancellor, in *FitzGerald* v. *Champneys* (1) as to the danger of relying upon the insertion of a saving clause in determining the construction of a statute; but that expression referred, not to the construction of the saving clause itself, which was not doubtful, but to its effect upon the construction of a general code of Acts in one of which it occurred, and in particular in altering the general rule of construction, *specialibus generalia non derogant.*

The question there was whether a very special Act, regulating the ecclesiastical arrangements of the parish of St. Pancras, in London, was, contrary to that general rule of construction, to be held to be repealed or affected by a subsequent general Act which did not refer to the special Act. In support of the argument that the prior Act was so affected, other general enactments were referred to, which expressly provided that their general enactments should not apply to a particular case which had been previously regulated by a special Act of Parliament not otherwise referred to in the general enactment; "from which," to use the words of Lord Hatherley, "an attempt was made to argue, that if no such saving clause had been inserted, the general enactment would have applied to the special case notwithstanding it had been previously regulated by the special Act of Parliament."

It was in reference to this argument that the words of Lord Hatherley, relied upon, were used, which point to the common knowledge that saving clauses are sometimes inserted, for sake of caution, in cases in which, having regard to general rules of construction, they are unnecessary. I need not say that these words are not in point here, where we have to construe the saving clause itself—a clause which in words and intention is quite clear.

The subject-matter of the Irish Church Act was, *inter alia*, ordinary churches—churches of which at common law the freehold was vested in the rector; the saving clause is in respect of a wholly different class of churches—churches erected and endowed by a private individual under the provisions of a special code of Acts

(1) 2 J. & H. 31, at p. 59.

of Parliament, under which their property, their management, and the patronage in respect of them, were made the subject of special provisions, some wholly statutory, others dependent upon their being contained in their deeds of endowment.

I pass from this section, merely observing that it means what it says. Its object was to prevent general expressions used in the body of the Act being read so as to affect the patronage, property in, or management of these proprietary churches, and there is nothing in the Act in which it is found to restrict its full operation.

The Church of St. John the Evangelist, Sandymount, is a proprietary one, erected in the years 1849 and 1850, in conformity with the provisions of the Church Building Acts, by the late Lord Herbert of Lea, then Mr. Sidney Herbert.

At the time of its erection, the Church Building Acts which were in force were the 6 & 7 Wm. 4, c. 31, as amended by the 3 & 4 Vict. c. 101; and the 12 & 13 Vict. c. 99. The 6th section of this latter Act enacts that:—

"Two fit and proper persons may be appointed to act as churchwardens for every church or chapel erected, appropriated, or endowed under the provisions of this or any other Act, for the encouragement of the building of churches or chapels in Ireland as aforesaid, at the usual period in every year for the appointment of parish officers, one of such churchwardens to be named by the incumbent or minister of such church or chapel, and the other by the proprietors or holders of pews in such church or chapel; and such churchwardens, when so elected, admitted, and sworn as in other cases of churchwardens of parochial churches, shall have authority, *within the said church or chapel,* and any district legally assigned thereto, or connected therewith, as in the case of a parish and parochial church is lawful and usual for the churchwardens thereof." The section then proceeds to enact that such church or chapelwarden shall and may, unless otherwise provided by the deed of endowment, as it is in the present case, take care of the repairs of the church or chapel, and the management of its funds, and be competent to recover the pew rents and other dues, and that proceedings for that purpose shall not abate by reason of his death, removal, or going out of office.

Appeal.
1914.

LE FANU
v.
RICHARDSON.

Palles, C.B.

The deed of endowment bears date the 1st April, 1850. It recites, *inter alia*, that the said Sidney Herbert, before the building of the church, agreed with the Archbishop of Dublin, and the other parties thereto, to grant the lease and make the endowment thereafter mentioned, so that the said church when completed and endowed should be and become a perpetual cure within the meaning and provisions of the Act 6 & 7 Wm. 4, c. 31, as amended by the Acts 3 & 4 Vict. c. 101, and 12 & 13 Vict. c. 99. It then proceeds to constitute seven gentlemen trustees of the church (for whose perpetual succession provision is made); it vests in them the church and its endowments, and then contains a declaration of trust prefaced by the following words:—"That they, the trustees, have mutually and reciprocally covenanted, declared, promised, and agreed, and by these presents do and each of them doth for himself his heirs, executors, administrators, and assigns, covenant, declare, promise, and agree to and with the other and others of them and their respective executors, administrators, and assigns, and with the said Most Rev. Father in God, Richard, Lord Archbishop of Dublin, and his successors, in manner following, that is to say, that they are become and shall be, remain, and continue, associated with and jointly bound to the other and others of them by and under the title of Trustees of the Church of St. John the Evangelist, Sandymount, for the trusts and purposes, and subject to the provisions, declarations, limitations, and agreements herein, and in the said Acts of Parliament hereinbefore in part recited in that behalf mentioned and declared."

Mr. Justice Barton is reported to have expressed the opinion that "a power" contained in this deed of endowment is not part of the trust relating to the church as originally constituted. With much deference I am unable to agree in this. I am of opinion that a provision in the deed relating to the management of the church, whether obligatory or only permissive, may be, and in this deed is, "a provision" which constitutes part of the trust.

The deed then contains provision for the appointment of the minister by the trustees, and proceeds:—"And it is hereby further declared by and between the parties of the fourth part," *i.e.*, the

trustees, "that the minister for the time being shall, subject to the rules and regulations herein contained, and also to the lawful control of the Archbishop of Dublin for the time being, have the exclusive management, control, and discretion of any matter or thing relating to or concerning said church, save as herein is otherwise directed, and that he shall, subject as aforesaid, have the appointment, control, and power of removal of all and every the inferior officers and other persons from time to time employed in respect thereof. And, further, that the said trustees for the time being, or the major part of them, shall have full power to regulate the amount and mode of payment of the rents for pew-sittings in said church, and to nominate and appoint a person to collect all the rents at such salary or percentage as they shall think fit; and also to nominate and appoint three or more lay gentlemen who shall be in the habit of frequenting said church to act in the capacity of a lay committee or church or chapel wardens in respect of said church, and from time to time to remove them, or any of them, and appoint others in their place or stead, provided that it shall be no part of the duty of the committee or church or chapel wardens to take care of the repairs of the church, or the management of the funds thereof."

In the year next after this deed—the year 1851—by the Act 14 & 15 Vict. c. 72, the Acts relating to proprietary churches were consolidated and amended. Nothing very important in this case turns on this Act. Its 27th sect. is, with exceptions not material here, the same as sect. 6 of the 12 & 13 Vict. c. 99.

I deem it unnecessary to refer to any of the other matters which have been the subject of discussion.

I am of opinion that the provision in the deed of endowment enabling the appointment by the trustees of a lay committee, and the powers conferred by the 12 & 13 Vict. c. 99 (or, if they are to be substituted for it, the powers conferred by the 27th sect. of 14 & 15 Vict. c. 72) constitute part of the "trust relating thereto"—*i.e.*, to "the church"—as originally constituted, within the meaning of sect. 70 of the Irish Church Act, 1869. The Act by its 19th sect. had repealed (so far as they related to the clergy and laity of the late Established Church when meeting in general synod) the Irish Convention Acts, and had empowered such

Appeal. 1914.

LE FANU v. RICHARDSON.

Palles, C.B.

synod to frame constitutions and regulations for the general management of the said Church and its property and affairs; and the intention of this 70th sect. was to preserve to the trustees of those proprietary churches, not only their patronage and property, but the management and administration of their churches as provided by their deeds of endowment, whether such provisions were permissive or obligatory. If this be so, any Constitution of the newly constituted Church as to the management or administration of churches could not lawfully affect a proprietary church so far as such Constitution was inconsistent with the trust relating to the church as originally constituted; and I am of opinion that the appointment, by a vestry, of churchwardens, or the constitution of a vestry with power to appoint churchwardens, was inconsistent with the trust relating to the Church of St. John the Evangelist, Sandymount. Admitting fully the difference in functions between the common-law churchwarden, and a churchwarden appointed under the Acts of 1849 and 1851 or a committee man under the deed of endowment, there are some functions common to both; and the appointment by a body, different from the trustees, of officers to perform duties which officers appointed by the trustees are charged with the performance of, is a disturbance of such latter officers in their duties, and inconsistent with their previous position.

I purposely abstain from expressing any opinion whether, even were there no part of the duties of the two sets of officers common to both, and if new officers for the performance of new duties connected with the management of this church were appointed or authorized by the Constitution of the general Church to be appointed, the appointment or authority to appoint would be ineffective and illegal, as this question is not before us.

For these reasons I am of opinion that the decree of Mr. Justice Barton should be reversed, and that there should be a decree declaring the appointment of Mr. Johnston as churchwarden to have been void, and for the injunction sought. The plaintiffs are entitled to their costs of the suit and of the appeal.

HOLMES, L.J. :—

Although the question for decision in this appeal—whether Mr. Johnston was on the 24th June, 1913, legally elected people's churchwarden of the Church of St. John the Evangelist, Sandymount—is not easily solved, the difficulties attending it lie within a narrow compass.

Before the Irish Church Act, 1869, became operative, there were, and had been from a very ancient date, attached to every parish church in England and Ireland officers designated churchwardens. Their duties, partly civil and partly relating to the discipline and property of the Church, can hardly be accurately defined. They had, I think, gradually developed by usage and custom; and a fairly full statement of them is to be found in some of the canons of the Constitution of the Church of Ireland, 1909, such as 42, 43, 44, 45, and 46 of Chap. IX. The mode of their election had been long well settled. There were two in every parish appointed each year at what was known as the Easter vestry, where were assembled the parishioners, with the incumbent presiding, the former electing one and the latter nominating the other.

At the time of the disestablishment of the Irish Church there were in this country many churches other than parish churches. These were called proprietary or trustee churches, erected pursuant to a succession of statutes which were finally consolidated and amended by 14 & 15 Vict. c. 72. The object of this legislation was to enable and encourage the erection and endowment by private enterprise of churches and chapels in which the liturgy and rites of the united Churches of England and Ireland as by law established should be used and observed, and which would be subject to the spiritual jurisdiction of the bishop of the diocese. For this purpose power was given to persons desirous of promoting such work to vest in trustees money and property, and to declare the trusts thereof, subject to the provisions in other respects of the statutes for the time being in force. St. John's Church, Sandymount, was built, and the endowments conferred thereon were vested in trustees by a deed of the 1st April, 1850. This instru-

Appeal. 1914.

LE FANU v. RICHARDSON.

Holmes, L.J.

ment fully sets forth the trusts attaching to the church and property; and there is not any suggestion that all its provisions are not in accordance with statutory powers. I am of opinion that there is nothing in this trust deed relating to churchwardens as that office was then understood in a parish church. It is true that the trustees are enabled to appoint three or more lay gentlemen who should be in the habit of frequenting the church to act in the capacity of a lay committee or church or chapel wardens in respect thereof, and from time to time to remove them and to appoint others in their place and stead; provided that it should be no part of the duty of said committee to take care of the repairs of the church or management of the funds thereof. I am, however, of opinion that this clause does not contemplate church or chapel wardens resembling those officers as these are known in parish churches. The number, the time, the mode of appointment, and the tenure of office, are wholly different. Moreover, the power thus created is quite unlike that conferred by the 27th sect. of the consolidating Act to which I shall now refer. That section enacts that "it shall be lawful to elect, admit and swear two fit and proper persons, being members of the united Church of England and Ireland, to act as chapel-wardens in any proprietary church or chapel erected, appropriated, or endowed under the provisions of this or any other Act for the encouragement of the building of churches or chapels in Ireland, in the same manner and at the same period in every year as in the case of churchwardens of parochial churches, one of such chapel-wardens to be named by the incumbent or minister, or by the bishop of the diocese in case there shall be none, and the other by the proprietors of pews in such church or chapel or by the trustees of the church or chapel in the first instance, before the said pews or one-third thereof shall be let; and such chapel-wardens when so elected, admitted, and sworn as aforesaid, shall have the like authority within the said church or chapel as churchwardens in the case of a parish church have, and shall, unless otherwise provided by the deed of endowment," perform certain duties usually carried out by ordinary churchwardens. I am satisfied that the object of this provision was to introduce into a trustee or proprietary church churchwardens of the kind well known in parish

churches; and it was acted on in Sandymount church from the first, chapel-wardens having been appointed pursuant to it by the trustees before the church was opened, and, as soon as the pews were let, by the minister and the pew proprietors every year as provided by the section. This practice continued until after the passing of the Act of 1869, during which period there occurred nothing material to the present action. Reference has indeed been made to the assignment under the provisions of sects. 13 and 14 of the Act of 1851 of portion of the parish of Donnybrook to St. John's, Sandymount. The effect of this was to place the assigned district under the care of the incumbent of St. John's as far as regards the visitation of the sick and other pastoral duties, without, however, discharging therefrom the incumbent of Donnybrook. The two incumbents were given concurrent spiritual jurisdiction; but, as far as I can see, it caused no alteration in the mode of appointing chapel-wardens for Sandymount Church.

I come now to the Act of 1869; its object was to put an end to the establishment of the Church of Ireland, and to make provision in respect of the temporalities thereof; but at the same time it declared that the then "ecclesiastical law of the Church of Ireland, and the present articles, doctrines, rites, rules, discipline, and ordinances of the said Church, subject to such (if any) modification or alteration as after the 1st January, 1871, may be duly made therein, according to the Constitution for the time being, shall be deemed to be binding on the members for the time being in the same manner as if such members had mutually contracted and agreed to abide by and observe the same." These words are taken from the 20th section of the Act; and there is no doubt that the modifications and alterations of its constitution mentioned therein were to be made by a general synod or convention, for the holding of which provision is made in section 19. Since 1871 a general synod of the Church has met annually, and the existing Constitution was enacted in 1909. It contains in its third chapter provisions relating to the appointment of churchwardens; and Mr. Johnston's defence to this action is that he was duly elected churchwarden under this enactment, as amended in 1912. In reply to this defence several interesting and difficult matters have been discussed as to which I do not intend to offer any opinion.

Appeal. 1914. LE FANU *v.* RICHARDSON. Holmes, L.J.

My judgment depends upon whether the 27th section of the Act of 1851, which I have quoted, is repealed by the Act of 1869. I have already stated my opinion that the object of this section was to introduce into a trustee or proprietary church churchwardens of the kind well known in parish churches, and the mode of appointment thereby provided differs from that laid down in the Constitution of 1909, as amended. Now, it is impossible to hold that in these churches there are two different modes of appointment equally legal; and it follows that unless the 27th section is now repealed, a churchwarden in the churches dealt with in that statute can only be appointed as therein provided. There is certainly no express repeal, and I am of opinion that there is none by implication. The Act of 1851 deals with the property, the patronage, and the trusts thereof, of a certain class of churches, but not with the ecclesiastical law, articles, doctrines, rites, rules, discipline, and ordinances thereof, which were to continue to be those of the united Church of England and Ireland. Therefore sects. 19 and 20 of the Act of 1869 would seem to relate to a wholly different subject-matter from that to which the earlier Act applies. This is made more clear by section 70 of the Irish Church Act—"Nothing in this Act contained shall affect the patronage or right of presentation to any proprietary . . . church . . . which has been endowed out of private funds, or affect the property therein, or the property held for the purposes of, or appropriated to the use of the same, or affect the continuance of the trust relating thereto as originally constituted." It seems to me that these words cover all, or almost all, the provisions of the Act of 1851, and certainly that relating to churchwardens, who by its terms "shall unless otherwise provided by the deed of endowment, take care of the repairs of the said church, and the management of the funds thereof, and be competent to recover the pew-rents and other dues belonging" to the same.

On this single ground, and without offering any opinion on the other questions argued, I concur in the judgment of the Court.

The Court made the following order:—

Let the judgment of Barton, J. (so far as same is appealed from), be reversed. In lieu, declare that the election of the defendant John E. Johnston as parishioners' churchwarden by the general vestry of St. John's, Sandymount, held on 24th June, 1913, is null and void. Let said defendant be restrained from acting as parishioners' churchwarden of said church, and from in any way interfering with the privileges and prerogatives of plaintiffs, or any of them, in the control and management of said church, or the affairs thereof.

Let the defendants, other than George Richardson, pay to the plaintiffs the costs of the action incurred in the court below, in so far as the same were occasioned by their claim for a declaration that the election of the defendant John E. Johnston as parishioners' churchwarden was null and void, and for an injunction to restrain said defendant from acting as such parishioners' churchwarden, the aforesaid costs to include the costs of the motion below for an interlocutory injunction, together with their costs of this appeal when taxed.

Solicitors for the plaintiffs: *Barrington & Son.*
Solicitors for the defendants: *Stewart & Orr.*

J. M.

Appeal.
1914.
Jan. 23, 26.
Feb. 24, 26.
May 14.

IN THE MATTER OF THE EVICTED TENANTS (IRELAND) ACT, 1907, AND THE ESTATE OF THOMAS ST. JOHN GRANT, THE SUPPOSED OWNER OF LANDS (No. 2) (1).

Compulsory purchase—Evicted Tenants (Ireland) Act, 1907 (7 *Edw.* 7, *c.* 56), *s.* 2, *sub-s.* 4—*Price—Value to the owner—Estates Commissioners.*

In the case of lands compulsorily acquired by the Estates Commissioners under the Evicted Tenants (Ireland) Act, 1907, the sum which the owner is entitled to be paid should represent, not the price which might reasonably be obtained upon a voluntary sale in the open market, but the value of the lands to the owner.

So held by the Court of Appeal, O'Brien, L.C., and Holmes, L.J., Cherry, L.C.J., dissenting.

APPEAL from an order of Wylie, J.

The Estates Commissioners proceeded in this matter to acquire compulsorily the estate of the owner in certain lands in the County Waterford, containing 63A. 1R. 25P., all in the owner's possession, and offered the owner as the price thereof a sum of £1350, payable in guaranteed 3 per cent. stock equal in nominal value thereto. The owner, being dissatisfied with this price, appealed to the Judicial Commissioner, who dismissed the appeal, but gave leave to appeal to the Court of Appeal on the following question of law:—"That the judge, in estimating the price to be paid by the Estates Commissioners for the purchase of the lands to be acquired in this matter, was wrong in taking into consideration the fact that the vendor would obtain the percentage payable under sect. 48 of the Irish Land Act, 1903, in addition to the purchase price offered by the Estates Commissioners." The Court of Appeal, by an order of the 5th May, 1913, remitted the case to Wylie, J., with an intimation that, in fixing the purchase price,

(1) In the Court of Appeal, before O'BRIEN, L.C., CHERRY, L.C.J., and HOLMES, L.J.

the bonus should not be taken into consideration (1); whereupon by an order of the 19th June, 1913, Wylie, J., being of opinion that the offer of the Estates Commissioners represented the full market value of the lands compulsorily acquired, dismissed the owner's appeal against the determination of the Estates Commissioners.

The following judgment was delivered by—

WYLIE, J.:—

In order to prevent any misconception as to my decision in this case, I think it is necessary, having regard to what has already taken place here and in the Court of Appeal, to state more fully than I usually do in such cases the grounds upon, and the method by which, I arrived at my former, as well as my present, decision.

By the 1st sect. of the Evicted Tenants Act, 1907, the Estates Commissioners are only empowered to acquire land compulsorily if they have offered for the land what is there described as "a price which appears to them to represent the value thereof," and the same section requires them to declare any land so acquired an estate, thus providing that the bonus which was given under the Act of 1903 to aid voluntary sales should be given to the vendor in addition to the price offered by the Estates Commissioners or fixed on appeal by the Judicial Commissioner.

In sect. 2, sub-s. 4, the required offer is described as "such a price as appears to the Estates Commissioners prima facie to be a reasonable price." Then sect. 2, sub-s. 8, provides that any person aggrieved by any determination of the Estates Commissioners fixing the price may appeal to the Judicial Commissioner, who shall hear and determine the appeal. There is nothing else in the Act throwing any light upon what is meant by "value" of the land in the 1st sect., or "reasonable price" in the 2nd sect., though both expressions describe the same thing—viz., the price or sum which the Estates Commissioners must offer to enable them to exercise their compulsory powers.

The question then is how is this "value" or "reasonable price" to be arrived at in the case of compulsory purchase? Is the fact

(1) *In re Grant's Estate*, [1913] 1 I. R. 414.

Appeal. 1914.

In re GRANT'S ESTATE, No. 2.

that the vendor will receive a bonus in addition to the price, to be considered at all in fixing the price? If the price were being fixed by voluntary agreement, everyone familiar with land purchase knows that the amount of the bonus is taken into account by the vendor, and in many cases where the Estates Commissioners have made an offer, the reply of the vendor has been: "I will accept the offer if you will guarantee that I will get a 12 per cent. bonus." The owner, therefore, in deciding whether the price offered is reasonable, takes into account what amount of bonus he will get in addition to the price.

That being so, the question at once occurred to me, when I was called upon to fix the price where the owner did not consider the price offered adequate:—Was I to leave out of account an important and valuable element that the owner himself would take into account in deciding whether the price was adequate? I was of opinion that I could not do so; that my decision should be based on the same materials as the owner himself would consider in deciding the same question. Accordingly, the method I adopted was this:—It being a case of compulsory purchase, I thought the owner should, in accordance with the usual principle applied in compulsory cases, get in cash what would represent the full value of the land to him, worked as he worked it in connexion with his other lands, but nothing more. I therefore fixed, in the first place, what upon the facts and evidence in the case I considered would be the full value of the land to the owner in cash. I then ascertained what amount of stock at the price of the day would, with the cash bonus added, be equal to such full value in cash. The amount of stock so ascertained I considered to be the "value" or "reasonable price" which the owner should get, in addition to the bonus. I could not then see, nor do I yet see, how an owner, even in a case of compulsory purchase, could expect to be paid in cash from the public funds more than the full value of the land to him; and it was immaterial to him that part of the cash was called purchase-money and part bonus.

The Court of Appeal do not appear to me to have understood my method. They seem to think that I considered the bonus as part of the "reasonable price" or purchase-money. Nothing could be further from my mind. They also appear to think

Appeal. 1914.

In re GRANT'S ESTATE, No. 2.

that neither the Estates Commissioners nor I could know, at the time of fixing the price, whether a bonus would be payable, or what its amount would be. That is quite a mistake. The owner has often been assured on both points before accepting the price offered. And I may add that frequently at that stage, where the legal adviser to the Estates Commissioners has some doubt on these points, he takes my ruling on them at that time. It is quite true that at that time we do not know for certain to whom the bonus will be paid, but the same can be said as to the purchase-money. The person dealt with as owner may turn out to have no title at all, and he will get neither bonus nor purchase-money.

The Court of Appeal, however, has decided that my method of arriving at the "reasonable price" is incorrect; that such price should be fixed without regard to the bonus; and that the price should be such a sum in cash as the vendor would be likely to obtain for his land upon a voluntary sale in the open market.

Dealing with the case on that basis, I have no doubt whatever that the offer of the Estates Commissioners represents the full market value of the land.

I therefore dismiss the appeal.

Conner, K.C., and *Farran*, for the appellant (the owner of the lands).

Jellett, K.C., De Renzy, K.C., and *Edmund Meredith*, for the Irish Land Commission.

May 14.

O'BRIEN, L.C.:—

This case first came before the Court on an appeal by the owner from a decision of Mr. Justice Wylie, sitting as Judicial Commissioner, in respect of which it was alleged by the appellant that when fixing the price to be paid for lands taken compulsorily under the Evicted Tenants Act, 1907, he had taken into account the fact that a percentage under sect. 48 of the Land Act, 1903, would be payable in respect of the sale.

It was contended that the bonus payable under sect. 48, and the price to be paid for the land, were different matters, and that this price should be fixed on a basis irrespective of whether or not a bonus should ultimately be payable.

Appeal. 1914. *In re* GRANT'S ESTATE, No. 2.

O'Brien, L.C.

To prevent error, we asked Mr. Justice Wylie three questions; and from the answers which he kindly gave, the Court inferred that he had taken into account in fixing the price the fact that a percentage might or would be payable.

Counsel for the Land Commission argued and pressed that any reasonable offer must be based on a consideration of the bonus being payable. This Court, as I understand its judgment, decided that the bonus which might possibly be payable should not be taken into consideration in fixing the purchase price, and the case was remitted to the Judicial Commissioner in order that the price might be fixed in accordance with this view: *In re Grant's Estate* (1).

My opinion was expressed in the following words:—"What the Estates Commissioners are to do is to fix a reasonable price for the land they propose compulsorily to acquire. That must mean, in my opinion, the price which the owner might reasonably expect to obtain at a voluntary sale if no bonus was payable" (p. 420). I desire formally to reiterate those words, which I conceived, and still consider, to be a correct statement of the law.

Mr. Justice Wylie, having reconsidered the matter, again fixed a price under the provisions of sect. 2 of the Evicted Tenants Act; and if the case stood only on the terms of this formal order, this Court could not further interfere; because the jurisdiction to fix a price, so far as the amount of it is concerned, is vested in the Judicial Commissioner, and only questions of principle can be settled by the Court of Appeal. But the Judicial Commissioner, in the present case, in a carefully considered judgment, apart from the order, amongst other material matters, states as follows:—"The Court of Appeal has decided that my method of arriving at the 'reasonable price' is incorrect; that such price should be fixed without regard to the bonus; and that the price should be such a sum in cash as the vendor would be likely to obtain for his land upon a voluntary sale in the open market."

So far as bonus is concerned this statement is accurate; but, confining myself to my own judgment, no reference whatever is made to "open market," or the cash sum to be obtained in such; it is unfortunate if the language which I used should bear such a

(1) [1913] 1 I. R. 414.

construction, and with all respect to the learned judge I do not consider it does; but to prevent any further misunderstanding, I wish to state distinctly that I had no intention of compelling the introduction of any such controlling factor, namely, price to be obtained in an open market which as a fact does not exist.

O'Brien, L.C.

If an owner is not subject to compulsion, the value of the land to himself must be, so far as he is concerned, the basis of price; and when he is compelled to sell, that must still be the basis of price. The function of the Commissioners seems to me to be to fix the price also on that basis; and if there is an appeal to the Judicial Commissioner, the same consideration must apply. The price must be a reasonable price, but the reasonableness is to be ascertained by reference to its value to the owner.

If he claims an unreasonable price, it is the duty of the Court to reduce it to a reasonable price. An owner over-estimating the reasonable price may ask an unreasonable price, but in ascertaining the reasonable price, reasonable value to him must be the basis of calculation when he is compelled to sell.

This Court has laid down one rule, and, in my opinion, another must now be added, that the reasonable price to be paid is not to be ascertained by reference to a supposed price in a non-existent open market, but on the principle I have endeavoured to express; and I consider the case should be again referred to the Judicial Commissioner for reconsideration, as he has, I think, erroneously attributed to the Court of Appeal a view which I conceive it did not express, and which affected his estimate.

I have carefully abstained from reference to the arithmetical difficulties which were the subject of comment at the Bar, arising out of the actual price arrived at. This is not for me, nor can I indicate or suggest what amount may ultimately be settled.

CHERRY, L.C.J.:—

This appeal raises an interesting question as to the principles to be applied in fixing the price of land which is being acquired by the Estates Commissioners under the compulsory powers vested in them by the Evicted Tenants (Ireland) Act, 1907. We have already decided, on the hearing of the previous appeal in this

Appeal. 1914. *In re* GRANT'S ESTATE, No. 2. Cherry, L.C.J.

case (1) that, in fixing this price, the "bonus" or percentage which may be payable in respect of the sale under the Land Purchase Act, 1903, is not to be taken into account, but that the vendor, if he is entitled to receive it, is to get it *in addition* to the "reasonable price" to be fixed in accordance with the provisions of the Act. Our judgment on the previous appeal does not go beyond this one point, though Wylie, J., erroneously supposes that it does. There are, however, certain dicta in the judgment of the Lord Chancellor, and in my own, which refer to the method of valuation, and Wylie, J., has applied them, as he understood them, in fixing the price in accordance with our order. The question now is, whether he has calculated the price on a right basis. In his judgment he says that "the price should be such a sum in cash as the vendor would be likely to obtain for his land upon a voluntary sale in the open market," and he declares that in his opinion the offer of the Estates Commissioners represents "the full market value of the land," as so interpreted. The order of the Court expressly affirms this principle, declaring that "the said offer of the Estates Commissioners represents the full market value of the lands compulsorily acquired in this case."

The vendor boldly challenges this principle, and asks us to decide that it is wrong in law. His contention is, as I understand Mr. Conner's argument, that the price should be fixed in the same way as if the land were being acquired by a private corporation, such as a railway company, under the Lands Clauses Acts, for the purpose of its undertaking; that the value should be ascertained as the value of the land to the vendor, giving him liberal compensation for any inconvenience caused to him, adding a certain amount as compensation for disturbance (if the land is untenanted land), and giving him also the usual percentage for compulsion.

The first remark which occurs to me in reference to this contention is that it would be extremely unfair that the bonus should be paid to the vendor in addition to the sum so fixed. Mr. Conner very astutely first obtained our decision that the bonus was to be paid in addition to, and not as part of, the "reasonable price,"

(1) *In re Grant's Estate*, [1913] 1 I. R. 414.

and then, having secured it, contended that the reasonable price was to be fixed, not as if it were a voluntary sale under the Land Purchase Acts, but as if it were a compulsory sale under the Lands Clauses Acts.

But the "bonus" has always been calculated upon the value of the land as actually sold under the Land Purchase Acts. In the vast majority of cases where it is payable, the sale is voluntary; and to argue that a bonus is to be paid not only upon the market value of the land, but also upon the amount paid by way of compensation for disturbance, damages for consequential injuries to other lands in possession of the vendor, and other matters which are taken into consideration under the Lands Clauses Acts, seems to me to be most unreasonable. The bonus ought, in my opinion, to be calculated only upon the market value of the land; and the vendor, if he claims it, can only do so upon the assumption that the sale of the land is an ordinary sale under the Land Purchase (Ireland) Acts, and not under the Lands Clauses Acts.

Apart from any question of the bonus, I cannot see anything wrong in law in fixing the price of land sold under the Evicted Tenants Act at a sum which, in the words of Wylie, J., "represents the full market value of the land." It appears to me to be substantially in accordance with the principles laid down by this court, in *Leader's Estate* (1), for the redemption of head rents—a process which is also compulsory in its application, and is carried out under the same code. "Redemption price," as Holmes, L.J., lays down in that case, "must depend upon the marketable value of the head-rent itself, and not upon the price of other securities"; and the order of the Court, in the same case, is, if possible, still more plain. "Declare," it runs, "that the redemption price of the rent in the said order mentioned ought to be fixed at the price or sum which appears upon due consideration of all the circumstances of the case—*of the selling prices of similar interests*, of the value of money, and of the fact that the redemption is compulsory—to be the fair value thereof."

"The selling prices of similar interests," in this order, can only mean "market value"; and as to the allowance for com-

(1) [1904] 1 I. R. 368.

Appeal. 1914.

In re GRANT'S ESTATE, No. 2.

Cherry, L.C.J.

pulsion, this has never been looked upon, even in cases under the Lands Clauses Acts, as a matter of law. It is simply an allowance which may or may not be made at the discretion of the arbitrator; and which, in my opinion, clearly ought not to be made in a case where a bonus under the Land Purchase Acts is likely to be paid to the vendor.

Apart, therefore, from any consideration of the special provisions of the Evicted Tenants Act itself, I can see nothing wrong in the principle which has been adopted by Wylie, J., in this case. It appears to me to be strictly in accordance with the principle laid down by this Court as to the redemption of head-rents under the Land Purchase Acts of 1887 and 1896; and to be, in all other respects, reasonable.

But when we come to consider the particular terms of the Evicted Tenants Act itself, this conclusion appears to me to be irresistible. The Act is not an easy one to construe. The difficulties which meet us probably arise from the number of amendments introduced into it when passing through Parliament; and this question of the price was, as I well recollect, a thorny one between the rival parties. FitzGibbon, L.J., in his judgment in the *Clanricarde Case* (1), has, with his characteristic industry, traced the various amendments made and suggested, both by the House of Lords and the House of Commons, during its passage through Parliament. This is only, of course, by way of historical disquisition, for he does not suggest that the construction to be put upon the Act can now be determined by either the acceptance or rejection of certain amendments; but the history of the bill may at least prevent us from blaming the draftsman for apparent ambiguities in the Act.

The 1st section of the Act provides that if the Estates Commissioners consider it expedient to acquire any land for the purposes of the Act, "and if they have offered to the person appearing to them to be the owner of the land a price which appears to them to represent the value thereof, and he has not within the prescribed time accepted the offer," they may acquire the land compulsorily.

(1) [1909] 2 I. R., pp. 579–581.

Now, it appears to me plain that the "price" mentioned in this section must mean the "market price." It is an offer made by a willing purchaser to purchase at what he considers to be "the value" of the land. That must be, I think, the value as between vendor and purchaser, and that is market value.

The procedure to be followed in the case of a compulsory sale is set out in the 2nd section of the Act; and that section then provides that, after the publication of the necessary notices, &c., and the inspection of the lands, the Estates Commissioners "may, if they think fit, make an offer to the person appearing to them to be the owner of the land for the purchase thereof at such price as appears to them, prima facie, to be a reasonable price."

In my opinion the "reasonable price" mentioned in this section must be equivalent to the price of the land which appears to the Estates Commissioners "to represent the value thereof" in sect. 1, and I am fortified in that view by the statements of several eminent judges who have considered the question. Thus, Wright, J., in *The King* (*Hinds*) v. *Estates Commissioners* (1), says: "I do not think there is here any difference of meaning. It seems to me to be only a difference of phrase or form of expression; the same thing is meant." And Lord O'Brien, L.C.J., in the same case (2) says: "'Value,' the word used in sect. 1, and 'price,' the word used in sub-sect. 3 of sect. 2, are, in my opinion, convertible terms. The phraseology is different, but the meaning is one and the same." And Walker, C., in *The King* (*Clanricarde*) v. *Estates Commissioners* (3) says: "I see no distinction whatever between the words 'the value thereof' and the words 'reasonable price.'" If, therefore, "the value thereof" in section 1 refers to market value, as I think it does, "reasonable price," with which we are now dealing, must mean the same thing.

In my opinion the scheme of the Act, as a whole, was to enable the Estates Commissioners to provide holdings for evicted tenants by acquiring land for the purpose, if possible by voluntary sales, but, if not, then by compulsion, upon terms which, in their opinion, would represent what a voluntary vendor might reasonably expect to obtain from them.

(1) [1909] 2 I. R. at p. 260. (2) p. 275. (3) [1909] 2 I. R. at p. 566.

Appeal. 1914.

In re GRANT'S ESTATE, No. 2.

For these reasons I hold that there is no error in law in the principles which have been applied by Wylie, J., in fixing the value of the land acquired in this case; and, in my opinion, we ought not to remit the case to him for any further consideration or review, but should simply dismiss the appeal of the vendor.

HOLMES, L.J.:—

I cannot remember any order that has come before me in this Court which has puzzled me so much as that now under consideration. To explain my difficulty it is necessary for me to refer to some matters that preceded and led to the present appeal.

The Estates Commissioners, in the year 1912, proposed to acquire under the provisions of the Evicted Tenants (Ireland) Act, 1907, certain lands in County Waterford, in the owner's possession, whereupon it became necessary for them to offer what is described in section 1, sub-sect. 1, of the Act, "a price which appears to them to represent the value thereof," or what is described in section 2, sub-sect. 4, "such price as appears to them prima facie to be a reasonable price." An offer under these provisions having been made, and the owner being dissatisfied therewith, his petition was on the 23rd December, 1912, heard by the Estates Commissioners, who fixed the price at the sum of £1350, payable in guaranteed 3 per cent. stock equal in nominal value thereto. From this the owner appealed, under sect. 2, sub-sect. 8, to Wylie, J., who, on the 4th February, 1913, dismissed the appeal, giving at the same time leave to appeal to this Court on the following question of law—"That the judge, in estimating the price to be paid by the Estates Commissioners for the purchase of the lands to be acquired in this matter, was wrong in taking into consideration the fact that the vendor would obtain the percentage payable under section 48 of the Irish Land Act, 1903, in addition to the purchase price offered by the Estates Commissioners." When this appeal came before us, we had some doubt as to whether Wylie, J., in fixing the price, had taken into account, and, if so, to what extent, the fact that a percentage under section 48 of the Land Act, 1903,

would be payable in respect of the sale. We were under the impression that the practice of both the Estates Commissioners under this Act, and the judge on appeal, had been to fix the price without reference to the payment of what is called a bonus to the owner. Accordingly we directed our registrar to write to both the Estates Commissioners and the Judicial Commissioner, to ascertain whether this was so or not. The replies received indicated a remarkable difference in practice; for while the Estates Commissioners said that they fixed the price irrespective of whether the purchaser would receive a bonus or not, Wylie, J., informed us that he had taken this circumstance into account in this case, and I presume in other similar cases. He was also asked at what amount he assumed that such percentage would be fixed, and how much, if any, he deducted from the purchase price in respect thereof. His answer to the first of these questions was, that according to his recollection the figures worked out to a bonus of 12 per cent. To the second, he replied that he thought the best answer was to state how he arrived at what he considered the reasonable price of the land. I felt at the time that this statement was not strictly relevant to the subject-matter then before this Court, and I was not sure of the object of the judge in making it. At the same time, as it seemed to me, and I think to the other members of the Court, that the result, taken in connexion with his two previous replies, was to show that, having fixed the sum which upon the facts and evidence he considered to be the full value of the land to the owner in cash, he did not award this sum to the vendor, but he deducted therefrom the amount of bonus to which the vendor would be entitled. Accordingly, we made an order on that appeal, that the Court being of opinion that, in fixing the price of the land proposed to be compulsorily acquired under the Act of 1907, the fact that a percentage under section 48 of the Act of 1903 would be payable in respect of the sale should not be taken into account by the Judicial Commissioner; discharged the order appealed from; and remitted the case to Wylie, J., to proceed therein, having regard to the foregoing declaration, as to justice might appertain.

The case thus remitted was heard again on the 19th June

Appeal. 1914.

In re GRANT'S ESTATE.

Holmes, L.J.

last, and resulted in an order which I for some time found it difficult to understand. The Estates Commissioners, as I have already pointed out, on the owner's petition estimated the price at the sum of £1350, payable in guaranteed 3 per cent. Government stock equal in nominal amount thereto, and this they did quite irrespective of any bonus which the purchaser would be entitled to receive. The Judicial Commissioner, by dismissing the appeal from this adjudication of the Estates Commissioners, must have come to the conclusion that the lands were more valuable than the sum appealed from, inasmuch as he held that the price would be paid partly by the £1350 3 per cent. Government stock, and partly by the bonus. Indeed, in the absence of some mistake or blunder in calculation, which is not suggested, the necessary consequence of our order would have been for the judge to increase the amount fixed by the Estates Commissioners by the amount of the bonus. Instead of this, however, the judge again left the price estimated in December, 1912, unchanged, being of opinion that such price represented the full market value of the lands. As no additional evidence was given on this hearing, I can only account for this result by the circumstance that the Judicial Commissioner, misapprehending the basis of our former judgment, altered the principle on which he ascertained the value in a way which was neither argued in nor contemplated by this Court. This, I think, appears from the grounds and upon the method by which he arrived at his two decisions. He says that on the first hearing he thought that, as it was a case of compulsory purchase, the owner should, in accordance with the usual principle applied in compulsory cases, get in cash what would represent the full value of the land to him as he worked it in connexion with other lands, but nothing more. He therefore fixed, in the first place, what upon the facts and evidence he considered would be the full value of the land to the owner in cash. On the former appeal no one disputed that this was a legal and satisfactory method of ascertaining the value of the land. Speaking for myself, I do not think that I could improve on this language of the judge. We did not discharge his order because he had fallen into any error in principle in the mode in which he arrived at the full value in cash of the land, but because such value was in his view,

Appeal.
1914.

In re GRANT'S ESTATE, No. 2.

Holmes, L.J.

as I understood it, to be partly paid by the bonus. We were of opinion that the owner, in addition to the full value in cash, was to be paid such bonus as he was otherwise entitled to; and that only was the effect of our decision. Wylie, J., however, seems to think that we held that the price should be such a sum in cash as the vendor would be likely to obtain for his land upon a voluntary sale in the open market, and he has given leave for the owner to present this appeal on the ground that the judge was wrong in law in estimating the sum to be paid by the Estates Commissioners to be the sum which the vendor would obtain on such voluntary sale as aforesaid.

I am of opinion that, in estimating the price on this basis, he was wrong in law. When the owner of lands or other property voluntarily sells it in the open market, this fact in itself is the best evidence that the price he consents to take is its value. If he thinks otherwise, he can give a reserved bid, and withdraw it from sale. But it is a wholly different matter when an owner is obliged to sell for a price to be fixed by an authority over which he has no control. I have always understood that in such a case the sum to be paid should not be less than what would represent the full value of the land to the owner, worked as he had been in the habit of working it. These are the words of the Judicial Commissioner himself, and they follow what is to be found in many authorities. If there was to be substituted for this rule, such a sum in cash as the vendor would be likely to obtain for the land upon a voluntary sale in the open market, the almost certain result would be serious injustice where the Estates Commissioners exercised compulsory powers of purchase under the Act of 1907. The object for which these powers were conferred was to provide holdings for evicted tenants, and the voluntary sale of lands likely to be taken for this purpose is in large parts of Ireland a practical impossibility. The use in the statute of the words "a price which appears to" the Estates Commissioners "to represent the value" of the land, and "such price as appears to them prima facie to be a reasonable price," indicates, I think, clearly that the Legislature was not contemplating a price such as would be realized by a voluntary sale in the open market. If it had, it would have been easy

Appeal. 1914. *In re* Grant's Estate, No. 2.

to say so; but everyone knew that there was no such price. I, therefore, agree in the conclusion arrived at by the Lord Chancellor.

The Court made the following order:—

The Court being of opinion that the learned judge was wrong in law in limiting the sum to be paid by the Estates Commissioners for the lands herein proposed to be compulsorily acquired under the provisions of the Evicted Tenants (Ireland) Act, 1907, to be the sum which the vendor would obtain on a voluntary sale in the open market, let the order stand discharged, and this case stand remitted to Wylie, J., to proceed therein, having regard to the foregoing declaration, as to justice may appertain. Let respondents, the Estates Commissioners, pay appellant his costs of this appeal when taxed.

Solicitor for the owner: *W. F. St. Leger.*
Solicitor for the Irish Land Commission: *W. Alexander.*

R. ST. J. C.

M. R. 1913. Oct. 29, 30, 31. Nov. 1, 6, 7, 9.

LECKY *v.* WALTER.

(1912. No. 1043.)

Contract—Sale of bonds—Rescission—Innocent misrepresentation.

Bonds of a Dutch company, having property in America, were purchased on the faith of a representation that they were a charge on the property. They were not, in fact, a charge on the property, but the representation was made innocently.

Held, that the sale would not be set aside.

Seddon v. *The North Eastern Salt Company, Limited*, [1905] 1 Ch. 326, followed.

Trial of Action.

The following statement of facts is taken from the judgment of the Master of the Rolls:—

"In this action, as originally constituted, the plaintiff sought to have a contract for the sale to him by the defendant of eight

bonds of a Dutch company, known as Petroleum Maatschappij 'Henderson,' set aside on the ground of the defendant's fraud and misrepresentation. The charge of fraud was omitted from the statement of claim, and disavowed in express terms by the plaintiff's counsel at the bar; but although it thus completely passed out of the case, I feel bound to say at the outset, in justice to the defendant, that the charge of fraud appears to have been made without any justification, or even serious deliberation.

"The relief sought by the plaintiff has been reduced to a claim to have the contract set aside on the ground that he was induced to enter into it by misrepresentations made innocently by the defendant. Particulars of these misrepresentations are given in detail by the statement of claim, and they are eight in number; but, to my amazement, and I am sure to the amazement of everyone in court who heard his evidence at the trial, not only did the plaintiff swear that six out of the eight several misrepresentations which were alleged were not made to him at all, but further that he never gave instructions to his solicitor that they were made.

"Here, then, we have an action based originally upon fraud. Then we have the charge of fraud dropped, and in lieu thereof a charge against the defendant of making a series of misrepresentations, though without fraud; and then a disclaimer by the plaintiff himself of three-fourths of the allegations made on his behalf against the defendant. I cannot say where the responsibility for the miscarriage lies, but certainly no case was ever brought into court in a manner more calculated to prejudice a plaintiff.

"I must say this, however, for the plaintiff, lest I should be supposed to cast any undue reflection upon him. He appeared to me to be a perfectly truthful and conscientious witness, and the most that can be alleged against him is that possibly he lent his name a little too readily as plaintiff in an action which was really brought on behalf of a group of bond-holders, and that he did not give sufficient attention to the subsequent proceedings.

"The action, as I have said, has been reduced to one for setting aside a contract on the ground that it was induced by the defendant's misrepresentations. No charge of fraud is now made. I must, therefore, treat the misrepresentations, if in fact made, as having been made innocently, and by a bona fide mistake.

M. R. 1913. LECKY v. WALTER.

The defendant raises the defence (apart from a purely legal defence which I will afterwards specially deal with) that he never made the representations complained of, and, even if he did, that the plaintiff did not enter into the contract on the faith of these representations.

"These are the issues of fact which have to be determined. The defendant is a gentleman carrying on business in London. I do not know how else to describe him, because no evidence was given that he carried on any business other than that in connexion with the company in question. He is described in the statement of claim as a company promoter and speculator in oil-fields, and no doubt this was intended to be a disparaging description. But there was no evidence whatever that he was a company promoter as generally understood, and the only speculation with which he appears to have been connected was in the oil-fields belonging to the company in question.

"The history of these oil-fields, and of the company, is shortly as follows:—There are in fact oil-fields in Wyoming, U.S.A., and they are known as the Dallas Oil-fields. They are considerable in extent, and they are admitted by the plaintiff to be a most valuable property. They were originally owned by an Irishman of the not unfamiliar name of Murphy. He had appropriated them when Wyoming was only a territory, and was subject to incursions by Red Indians. When Wyoming was incorporated as a Federal State, his title was confirmed by the State authority, and he afterwards sold the property to a man named Henderson, and hence it is sometimes called the Henderson Oil-fields. The defendant purchased the property from Henderson in or about the year 1903.

"It is not necessary to give a detailed history of the property from that date down to the purchase of the bonds which occasioned the present action, but the following general account of the defendant's vicissitudes will help to explain the existing situation. The defendant had not the money to pay for the property which he agreed to purchase. He raised on the security of mortgages upon it about £90,000, and thus paid for it. This circumstance in itself would go to prove that the defendant had acquired very valuable oil-fields. The defendant in fact valued them at a sum vastly in excess of what he paid.

"The defendant having thus acquired the oil-fields, caused them to be conveyed to a person of the name of Lobell, who had the title registered in his name. This Lobell was only a trustee for the defendant, and the conveyance to him, instead of to the defendant himself, is explained by the fact that it was falsely represented to the defendant that, being an alien, he could not legally hold lands situated in the State of Wyoming. Lobell soon proved himself a most fraudulent trustee. He took advantage of his position of legal owner by raising mortgages upon the property for his own purposes; and, further, without the knowledge of the defendant, who was living in London, he promoted a company in Holland called the Petroleum Maatschappij 'Henderson,' which was to take over the property from himself as if he were the true owner. Some time after the incorporation of this company, the defendant discovered the gigantic frauds which had been perpetrated upon him. He proceeded criminally against Lobell, and eventually succeeded in compelling him to convey the property to the Dutch company, who had agreed with the defendant to satisfy his equitable claim upon the property by a cash payment, and by the issue to him of bonds of the company. These bonds were to be part of an issue of 5,000,000 florins, which was intended to provide sufficient funds to redeem the mortgages on the property, to purchase some adjoining property which the defendant had succeeded in acquiring, and to provide working capital. The sum to be raised by the company was a large one, but it is admitted by all parties that the property is a most valuable one, and its value had been considerably enhanced by the extension of a line of railway to a point only eight miles from the property, from a point about 170 miles distant.

"The defendant appears to have considered that the arrangement which he made with the company was a satisfactory one, and that everything bid fair for the prosperity of the undertaking. But Lobell was not the only person with whom he had to contend, for he found once again how difficult it was for a person living in London to protect a property in Wyoming against the machinations of very astute parties in the neighbourhood. The defendant and the company had been advised that the undertaking could be worked at a very great profit if a pipe-line were

M. R. 1913.

LECKY v. WALTER.

constructed so as to connect the oil-fields with the railway line, and this project was determined upon. The company and the defendant, however, appear to have been out-manœuvred by a very clever American, who, under the pretence of co-operation with the company, constructed a pipe-line between the railway and the oil-fields, and then claimed to have constructed it on his own account, and thus assumed control of the transport of the oil to a market-place. Here, again, was another difficulty seriously embarrassing the undertaking, because it was an obstacle in the way of working the oil-fields, and postponed the date at which the company could earn profits sufficient to meet the interest on the bonds.

"Meantime, money was required to redeem the mortgages on the property and for the development of the undertaking, and as time went on the conditions of the money-market were making it more difficult to procure money from the public.

"It was under these circumstances that the defendant, in the years 1909–10, was engaged in putting on the market the bonds in question. The bonds are of the face value of 1000 florins (Dutch), equivalent to £83 6*s.* 8*d.* sterling. They are bonds carrying only a general liability. They are not secured by any mortgage or charge on the company's assets, whether specific or floating, so that in winding up the company, or what would be equivalent to a winding up according to Dutch law, bond-holders would have no preference over ordinary creditors. This was admitted. The defendant had an agent in Dublin, a gentleman of the name of Molesworth, whom the defendant undoubtedly employed to dispose of some of the bonds in Dublin. Through Mr. Molesworth the defendant got into touch with another Dublin gentleman, named Evans, whose business is that of a mortgage broker. This latter gentleman put a number of these bonds on the Dublin market, and among others who purchased them through him was the plaintiff.

"The plaintiff purchased eight bonds from Mr. Evans at the price of £72 18*s.* 4*d.* per bond, making in all £583 6*s.* 8*d.*; and his case against the defendant is that Evans acted as the agent of the defendant in the transaction; that he induced the plaintiff to make the purchase by representations which were false in fact,

though innocently made; that the defendant is responsible for the misrepresentations of his agent; and that the plaintiff is consequently entitled to have the sale set aside and to have his money returned to him. The defendant traverses the agency and the misrepresentations, and denies that the plaintiff was induced by the alleged misrepresentations to purchase the bonds.

"I do not think it necessary in the circumstances to go through the evidence proving the relationship between the defendant and Mr. Evans. Suffice it to say that, in my opinion, it was conclusively proved that Mr. Evans was acting as the agent of the defendant in the sale of the bonds to the plaintiff, and I so find.

"The next question is—Were the misrepresentations complained of made by the defendant?

"These misrepresentations are narrowed down to two, those mentioned under the headings (A) and (E) in the 4th paragraph of the statement of claim. They are:—(A), that each of the said bonds was charged upon and fully secured by the Dallas Oilfields, Wyoming, U.S.A., and other property of the said company, and (E), that a new company was to be formed in England by the defendant, part of the terms of the flotation of which was that the bond issue of the Petroleum Maatschappij 'Henderson,' including the plaintiff's bonds, was to be taken over by the said new company, and that a profit of 12½ per cent. per bond would be paid to the bond-holders upon the said bond issue being taken over by such new company as aforesaid, and that the defendant was in a position to float the said new company upon a sound financial basis, and that such new company would have the opportunity of acquiring, and would in fact acquire, certain valuable properties.

"It was alleged that these representations were made by the defendant's agent, Mr. Evans, to the plaintiff, when negotiating with him for the sale of the bonds."

[The Master of the Rolls, having reviewed the evidence, found as a fact that the representation (A) was made; that it was admitted that such a representation, if made, was untrue; and that it had not been proved to his satisfaction that the representation (E) was made.]

M. R. 1913.

LECKY v. WALTER.

Serjeant Matheson, K.C., Herbert Wilson, K.C., and *Swayne*, for the plaintiff.

T. M. Healy, K.C., and *Philip A. O'C. White*, for the defendant.

The nature of the arguments sufficiently appears from the judgment of the Master of the Rolls. The following authorities were cited: *Jennings* v. *Broughton* (1); *Rawlins* v. *Wickham* (2); *Wilde* v. *Gibson* (3); *Kennedy* v. *Panama, New Zealand, and Australian Mail Co.* (4); *Torrance* v. *Bolton* (5); *Redgrave* v. *Hurd* (6); *Brownlie* v. *Campbell* (7); *Adam* v. *Newbigging* (8); *Metropolitan Coal Consumers' Association, Karberg's Case* (9); *Seddon* v. *North Eastern Salt Co.* (10); *Heilbut, Symons, & Co.* v. *Buckleton* (11).

Dec. 9.

O'CONNOR, M.R.:—

[The Master of the Rolls, having stated the facts as above set out, proceeded as follows:—]

I do not consider that the failure of the plaintiff to prove the second misrepresentation is a material element in the case, because the first representation was one of a most important character, and such as would necessarily influence any person invited to purchase the bonds, and I am satisfied from the plaintiff's evidence that the statement that the bonds were charged on the oil-fields was, if not the only inducement, a material inducement to purchase them.

I need not pause to establish the proposition that it is not necessary to prove that a particular representation was the sole cause of the transaction, and that it is enough that it constituted a material inducement. I have now come to the point when I consider it established that the plaintiff purchased the bonds from the defendant, and that he was induced to make the purchase by misrepresentation by the defendant's agent, which is equivalent

(1) 5 D. M. & G. 126.
(2) 3 De G. & J. 304.
(3) 1 H. L. C., at pp, 632, 633.
(4) L. R. 2 Q. B. 580.
(5) 14 Eq. 124; L. R. 8 Ch. 118.
(6) 20 Ch. D., at p. 12.
(7) 5 A. C. 925.
(8) 13 A. C. 308.
(9) [1892] 3 Ch. 1.
(10) [1905] 1 Ch. 326.
(11) [1913] A. C. 30.

to misrepresentation by the defendant himself. The purely legal question then arises, Does this state of affairs give the plaintiff the right to set aside a transaction which has been in fact completed, and is not merely in the process of completion? It must be borne in mind that there is no allegation of fraudulent misrepresentation, and therefore the case is to be treated as one in which a *bona fide* mistake was made by the defendant.

MR. Healy, counsel for the defendant, contended that in such circumstances the plaintiff had no cause of action, and he relied upon the judgment of Lord Campbell in the House of Lords in *Wilde* v. *Gibson* (1), where he says:—"My Lords, after the very attentive and anxious consideration which this case has received, I have come to the clear conclusion that the decree appealed against ought to be reversed; and I must say that in the Court below the distinction between a bill for carrying into execution an executory contract, and a bill to set aside a conveyance that has been executed, has not been very distinctly borne in mind. With regard to the first: if there be, in any way whatever, misrepresentation or concealment, which is material to the purchaser, a court of equity will not compel him to complete the purchase; but where the conveyance has been executed, I apprehend, my Lords, that a court of equity will set aside the conveyance only on the ground of actual fraud. And there would be no safety for the transactions of mankind, if, upon a discovery being made at any distance of time of a material fact not disclosed to the purchaser, of which the vendor had merely constructive notice, a conveyance which had been executed could be set aside."

In *Brownlie* v. *Campbell* (2), Lord Selborne affirms the same principle. He says there: "Passing from the stage of correspondence and negotiation to the stage of written agreement, the purchaser takes upon himself the risk of errors. I assume them to be errors unconnected with fraud in the particulars, and when the conveyance takes place it is not, so far as I know, in either country the principle of equity that relief should afterwards be given against that conveyance, unless there be a case

(1) 1 H. L. C. 605, at pp. 632-3. (2) 5 A. C. 925, at p. 937.

M. R. 1913

LECKY v. WALTER.

of fraud, or a case of misrepresentation amounting to fraud, by which the purchaser may have been deceived."

There appears to be no doubt that the law established by these cases is just as applicable to the sale of a chattel or a chose in action as to the sale of real property which is carried out by conveyance: *Seddon* v. *The North Eastern Salt Co., Limited* (1).

How are these authorities met by the plaintiff's counsel? Mr. Wilson in reply admitted, as of course he was obliged to admit, that the authorities referred to were binding on this Court, but argued that they only apply to cases in which the purchaser has got in substance what he contracted to buy, and have no application when he has got something substantially different; and he relies upon the judgment of Blackburn, J., in *Kennedy* v. *Panama, New Zealand, and Australian Mail Co.* (2), and particularly on the passage quoted by Joyce, J., in *Seddon* v. *The North Eastern Salt Co., Limited,* (1). Lord Blackburn, then Blackburn, J., says at p. 587—"There is, however, a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under the belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If he was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty; and even if there was a warranty, he cannot return the horse and claim back the

(1) [1905] 1 Ch. 326. (2) L. R. 2 Q. B. 580.

whole price, unless there was a condition to that effect in the contract."

Now, if I may so speak of such an eminent judge as Lord Blackburn, the proposition which he there lays down must commend itself, not only to all lawyers, but to all persons of sound judgment. If there is a complete difference in substance between the thing contracted for and the thing delivered, there is a complete failure of consideration, and the price may be recovered. But if the thing delivered is in substance what was contracted for, and the price is paid, the transaction stands, and the purchaser has no remedy unless there has been a warranty. I am speaking of course of cases in which there has been no fraud, and where any misrepresentation which has induced the contract was a wholly innocent misrepresentation. Lord Blackburn gives as an example the common case of a horse bought on the representation that it was sound. The purchaser has no remedy unless he has got a warranty; and why? Because he has got in substance what he contracted for, viz., a horse. The horse may be in fact unsound, but still it is a horse, even though a very inferior one; and there is not a complete failure of consideration.

There would, of course, be a complete difference in substance if some animal other than a horse had been delivered, if such a thing can be imagined. I will try to give an example nearer akin to the present case. If a man contracts to purchase mortgage debentures of a public company, and takes delivery of what he believes to be such, but what he afterwards discovers to be ordinary shares, he has not got in substance what he bargained for, but something quite different, one being a specifically secured liability of the company, the other being a share in the company's undertaking on which the liability is imposed. Here again there is a complete failure of consideration. In *Kennedy* v. *Panama, New Zealand, and Australian Mail Co.* (1), the plaintiff sought to set aside the contract for taking shares in the company on the ground that it was induced by an untrue statement in the company's prospectus that the company had a contract with the Government of New Zealand for an important monthly mail service. The statement was made quite innocently, and as the

(1) L. R. 2 Q. B. 580.

M. R. 1913.

LECKY v. WALTER.

result of mistake. It was held that the plaintiff was not entitled to any relief, there having been no fraud, and he having got what he contracted for, viz., shares, although not so valuable as they would have been if the company had had the mail contract mentioned. Lord Blackburn, in his judgment, referred to two reported cases: *Gompertz* v. *Bartlett* (1) and *Gurney* v. *Wormersley* (2), in which the plaintiffs got relief on the ground that they did not get what they bargained for. In each case there was a sale of a bill of exchange: in one case the bill was a forgery; in the other the bill was void under the stamp laws. In neither case did the plaintiff get what he contracted for—a valid bill of exchange.

I think that these decisions make it easy to determine whether in the present case the plaintiff got in substance what he agreed to buy.

Let me refer to the statement of claim. In the second paragraph the contract is stated thus—"2. By a contract made in the month of May, 1910, the plaintiff agreed to purchase from the defendant, and the defendant agreed to sell to the plaintiff, eight 6 per cent. bonds of the face value of 1000 florins (Dutch), equivalent to £83 6*s.* 8*d.* of the Petroleum Maatschappij 'Henderson,' a limited liability company established in the Hague in Holland, at the price of £72 18*s.* 4*d.* per bond." Well, the plaintiff has got what he bought. He agreed to buy bonds and he has got bonds. They may be of little or no value, but they are bonds. It is not alleged that they are forgeries. Their validity is not in any way impeached. In substance, then, the plaintiff has got what he bargained for. Mr. Wilson's answer to this is that the bonds were represented to the plaintiff to be charged upon and fully secured on the oil-fields. But this is not alleged as a matter of contract. It is alleged as a matter of inducement leading up to the contract, which is wholly different. This is the way the case was presented both by the statement of claim, by the opening statement of counsel, and by the evidence. It was not until the defence was opened up by Mr. Healy that any attempt was made to represent the contract as anything other than that alleged in the second paragraph of the statement

(1) 2 E. & B. 849. (2) 4 E. & B. 133.

of claim. If the contract was as contended for by Mr. Wilson, that is, if the representation was part of the contract, there might have been a warranty which would give the plaintiff the right to relief. But a representation is not necessarily a warranty. It may be only an inducement, and such it appears to me to have been in the present case. I am, therefore, bound to hold that inasmuch as the contract was completed, and there was no fraud, the sale cannot be set aside, and the action must be dismissed with costs to be paid by the plaintiff to the defendant.

M. R. 1913.

LECKY *v.* WALTER.

Solicitor for the plaintiff: *Herbert Malley.*
Solicitors for the defendant: *D. & T. FitzGerald.*

W. L.

DUBLIN CITY DISTILLERY, LIMITED *v.* DOHERTY.

H. L. 191[illegible]

Feb. 27
July 17.

Company — Constructive delivery — Delivery warrant — Whiskey stored in distiller's warehouse — Bill of sale — Registration — Mortgage or charge — Debentures — Unregistered debentures issued after commencement of Companies Act, 1900, secured by trust deed executed before Act — Winding up — Appeal by liquidator — Sanction of Court — Bills of Sale (Ireland) Act, 1879 (42 & 43 Vict. c. 50), s. 4 — Companies Act, 1900 (63 & 64 Vict. c. 48), s. 14 — Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151.

APPEAL from an order of the Court of Appeal affirming the order of Barton, J. See case reported [1912] 1 I.R. 349, 363, *sub nom. Doherty* v. *Kennedy.*

Younger, K.C. (of the English Bar), and *A. Alfred Dickie*, for the appellants.

Ronan, K.C., and *Herbert Wilson, K.C.* (with them, *Cave, K.C.*, of the English Bar, and *J. Walker Doherty*), for the respondent.

The House of Lords reversed the order appealed from in so far as it declared that the respondent was entitled to a valid pledge of the whiskey comprised in the delivery warrants, and that such warrants did not require registration. The House

H. L. 1914.

DUBLIN CITY DISTILLERY, LIMITED *v.* DOHERTY.

of Lords affirmed the order in so far as it declared the respondent entitled to a lien for the amount of his advances on the debentures, although unregistered, issued to him after the commencement of the Companies Act, 1900, to the extent of the property comprised in the trust deed (unregistered) executed in 1895, securing such debentures.

A preliminary objection having been taken by the respondent that the appeal was incompetent inasmuch as leave to appeal had not been obtained from Barton, J., by the liquidator, under sect. 151 of the Companies (Consolidation) Act, 1908, which, in case of a winding up by the Court in Ireland, empowers a liquidator with the sanction of the Court to bring or defend legal proceedings in the name and on behalf of the company, the House of Lords held that the section does not confer on third parties any right to object to proceedings brought by a liquidator in the name of the company on the ground that the sanction of the Court has not been obtained, and that leave to appeal was not necessary (1).

Solicitors for the appellants: *Charles Russell & Co.* for *Robert Dickie.*

Solicitors for the respondent: *Leman & Co.*, for *F. Kennedy & Sons.*

(1) [1914] A. C. 823.

INDEX.

ABSOLUTE ORDER FOR SALE—Land Judge—Conversion - - - 268
See CONVERSION.

ACCIDENTAL SLIP—Order—Amendment - - - - - - 73
See PRACTICE. 1.

ACTION—Against public body—naming special defendants - - - 16
See LOCAL GOVERNMENT. 2.

—— Cause of—Breach of statutory duty 16, 113, 118, 201, 208
See LOCAL GOVERNMENT. 2, 3, 4.

—— To restrain breach of public trust—necessity to join Attorney-General - - 16
See LOCAL GOVERNMENT. 2.

ADMINISTRATION OF ASSETS—Crown debt—Priority—Debt due to Irish Land Commission - - - - - 175
See EXECUTOR.

ADVANCEMENT—Presumption of — Wife—Deposit receipt in names of husband, wife, and third party - - 89
See HUSBAND AND WIFE.

AFTER-ACQUIRED PROPERTY — Covenant to settle—Gift from husband to wife
See SETTLEMENT. 1. [135

ALIENATION—Provision against—Devise to married woman — Property not to be mortgaged or sold—Life estate for separate use with restraint on an anticipation
See WILL. 4. [111

AMENDMENT—Order—Accidental slip 73
See PRACTICE. 1.

ANTICIPATION — Restraint on — Devise to married woman—Property not to be mortgaged or sold—Life estate—Separate use
See WILL. 4. [111

APPEAL—Company—Winding up—Appeal by liquidator without sanction of Court 389
See PLEDGE.

—— Order of Court of Appeal—Jurisdiction of Court of first instance to enforce 30, 32
See PRACTICE. 2.

APPORTIONMENT—Bequest of debts due at testator's death — Dividends declared after death—Apportionment Act, 1870
See WILL. 1. [81

APPROPRIATION OF PAYMENTS—Mortgage to bank to secure current account—Subsequent mortgage by mortgagor "as beneficial owner"—Rule in *Clayton's Case*—Marshalling securities
See MORTGAGE. 2. [180

ARMS—Royal Arms—Unauthorized user—Injunction - - - - - 236
See ROYAL ARMS.

ATTACHMENT—Contempt of Court—Order of Court of first instance reversed by Court of Appeal—Jurisdiction of Court of first instance to enforce by attachment order of Court of Appeal - - - 30, 32
See PRACTICE. 2.

ATTORNEY - GENERAL — Joinder of—Labourers Acts—Action by agricultural labourer not given preference in letting of cottage - - - - - 16
See LOCAL GOVERNMENT. 2.

BAILIFF—Person entering on lands of lunatic—New letting—Constructive trust—Graft
See LUNATIC. [53

BANK—Mortgage to secure current account—Subsequent mortgage—Appropriation of payments — Rule in *Clayton's Case* — Marshalling securities - - 180
See MORTGAGE. 2.

BENEFICIAL OWNER—Mortgage by mortgagor as—Notice by mortgagee of prior incumbrances—Marshalling 180, 285
See MORTGAGE. 2, 3.

BENEFIT SOCIETY — *Unregistered Friendly Society—Action for dissolution—Unexpended funds—Charity* — Cy-près—Bona vacantia — *Resulting trust.*] A society was established by a canal company for the benefit of its boatmen and workmen. Each member contributed a weekly sum, which was supplemented by a weekly contribution from the company. The society was not registered. The management of the society was entrusted to a committee, which consisted of three elected members and three officials of the company. This committee was given the regulation of the affairs of the society, and the power to frame or amend the rules when requisite. The contributions to the funds were lodged to the credit of the society, and the company was trustee for it. The fund of the society was applied, pursuant to the rules, in payment of sick and mortality benefits to members and their families. When the National Insurance Act, 1911, came into force, it was found impossible to carry on the business of the society, and it was resolved to wind it up, and an action for that purpose was brought on behalf of the members against the committee and the company, the Attorney-General being afterwards made a party. The unexpended funds amounted to £1170. *Held*, (1) that the society was not a charity to which the doctrine of *cy-près* could be applied, neither was the Crown entitled to the funds as *bona vacantia*; (2) that the contributions of the company were absolute gifts to the society, and that there was no resulting trust in favour of the company; and (3) that the funds were the property of the society, and were divisible amongst the existing members at the time when the business of the society ceased to be carried on, in proportion to the amounts contributed by them. *Cunnack* v. *Edwards* ([1896] 2 Ch. 679) distinguished. *In re Printers' and Transferrers' Amalgamated Trade Protection Society* ([1899] 2 Ch. 184) considered. *In re The Trusts of the Grand Canal Boatmen and Workmen's Benefit Society Funds*; *Tierney* v. *Tough* M. R., 142

BEQUEST.
See under CHARITY.
WILL.

BILL OF SALE—Delivery warrant—Company—Registration - - - - 389
See PLEDGE.

BOARD OF WORKS—Loan—Statute of Limitations - - - - - - 124
See LIMITATIONS, STATUTE OF.

BONA VACANTIA—Benefit Society—Dissolution—Unexpended funds - - 142
See BENEFIT SOCIETY.

CASES — *Attorney-General* v. *Sidney Sussex College*, L. R. 4 Ch. App. 722, followed
See CHARITY. 1. [194

—— *Carbery* v. *Cox*, 3 Ir. Ch. R. 231, considered
See CHARITY. 3. [305

—— *Carroll's Estate, In re*, [1901] 1 I. R. 78, followed - - - - - 188
See MORTGAGE. 1.

—— *Chessum & Sons* v. *Gordon*, [1901] 1 Q. B. 694, applied and followed - 73
See PRACTICE. 1.

—— *Clayton's Case*, 1 Mer. 572, applied 180
See MORTGAGE. 2.

—— *Cunnack* v. *Edwards*, [1896] 2 Ch. 679, distinguished - - - - - 142
See BENEFIT SOCIETY.

—— *Ellis's Settlement, In re*, [1909] 1 Ch. 618, followed - - - - - 135
See SETTLEMENT. 1.

—— *Eykyn's Trusts*, 6 Ch. D. 115, followed 89
See HUSBAND AND WIFE.

—— *Farrell* v. *Maher*, 42 I. L. T. R. 156, not followed - - - - - 53
See LUNATIC.

—— *Hearn* v. *Donellan*, [1901] 1 I. R., p. 402, note, considered - - - 305
See CHARITY. 3.

—— *Kehoe* v. *Wilson*, 7 L. R. Ir. 10, considered
See CHARITY. 3. [305

—— *Kinghan* v. *Matier*, [1905] 1 I. R. 272, not followed - - - - - 135
See SETTLEMENT. 1.

—— *Leslie's Hassop Estates, In re*, [1911] 1 Ch. 611, applied and followed - - 5
See LAND PURCHASE ACTS. 7.

—— *Liston* v. *Keegan*, 9 L. R. Ir. 539, considered
See CHARITY. 3. [305

—— *Maunsell's Estate, In re*, Mac C. 103, followed
See LAND PURCHASE ACTS. 6. [302

—— *Murphy* v. *Hynes*, [1906] 1 I. R. 505, considered - - - - - - 305
See CHARITY. 3.

—— *Plumptre's Settlement, In re*, [1910] 1 Ch. 609, followed - - - [135
See SETTLEMENT. 1.

—— *Printers' and Transferrers' Amalgamated Trades Protection Society, In re*, [1899] 2 Ch. 184, considered - - 142
See BENEFIT SOCIETY.

—— *Rocella's Estate, In re*, 32 I. L. T. R. 8, followed - - - - - 188
See MORTGAGE. 1.

CASES—*continued.*

—— *Roche* v. *McDermot*, [1901] 1 I. R. 304, considered - - - - - 305
See CHARITY. 3.

—— *Seddon* v. *North-Eastern Salt Company, Limited*, [1905] 1 Ch. 326, followed
See CONTRACT. [378

—— *Sims* v. *Quinlan*, 16 Ir. Ch. R. 191, considered - - - - - 305
See CHARITY. 3.

—— *Stinson's Estate, In re*, [1910] 1 I. R. 13, distinguished - - - - 268
See CONVERSION.

Tevlin v. *Lisnaskea Rural District Council*, [1914] 2 I. R. 15, distinguished - 16
See LOCAL GOVERNMENT. 2.

CHARGE—Company—Registration - 389
See PLEDGE.

CHARITABLE DONATIONS AND BEQUESTS—Commissioners of—Order for payment of trust funds to 194, 271
See CHARITY. 1, 4.

CHARITY—*Bequest to college for the education of testator's relations—Order for payment to Commissioners of Charitable Donations and Bequests.*] A testator bequeathed to St. Jarlath's College, Tuam, the sum of £600, the interest on which was to go for ever towards the education of his relations in that college, preference to be given to the most eligible and best conducted, the selection to be given to the Archbishop for the time being, to a conscientious layman, and to the parish priest of the boy to be considered. There were no trustees of St. Jarlath's College, nor any deed of foundation. The affairs of the College were managed by a council. *Held*, that the bequest was a valid charitable bequest. *Attorney-General* v. *Sidney Sussex College* (L. R. 4 Ch. App. 722) followed. An order was made that the amount of the bequest should be paid to the Commissioners of Charitable Donations and Bequests, subject to their consenting to accept it; that the Commissioners should pay the income to the treasurer or other proper officer of the college, and that it should be the duty of the college authorities at all times to have and educate in the college one relative of the testator, to be selected by the Roman Catholic Archbishop of Tuam for the time being, and by a conscientious layman to be appointed for the purpose by the college authorities; the selection of the boy claiming to be admitted to the college to be subject to the approval of the parish priest of the parish in which the boy resided. *In re Lavelle*: *Concannon* v. *Attorney-General* [M. R., 194

CHARITY—*continued.*

2. —— *Bequest to Monastic Order—Bequest for benefit of monastery and works of charity carried on by Order—10 Geo. 4, c. 7.*—Bequest "to the Superior for the time being of the Cistercian monastery, Mount Melleray, the sum of £1000 for the use and benefit of said monastery, and the works of charity carried on by said Order": *Held* void, as being a gift to an illegal community. *Ellard* v. *Phelan* Ross, J., 76.

3.——*Bequest to Monastic Order—Validity—Bequest for the decoration or improvement of the Roman Catholic Church of the Carmelite Fathers—Roman Catholic Relief Act*, 1829 (10 *Geo.* 4, *c.* 7). A testatrix by her will directed that portion of the residue of her estate should be applied "for the decoration or improvement of the Roman Catholic Church of the Carmelite Fathers at Clarendon Street, in the city of Dublin." *Held*, that the bequest was a valid charitable bequest, and was not void under the Roman Catholic Relief Act, 1829. *Carbery* v. *Cox*, 3 Ir. Ch. R. 231; *Sims* v. *Quinlan*, 16 Ir. Ch. R. 191, 17 Ir. Ch. R. 43; *Kehoe* v. *Wilson*, 7 L. R. Ir. 10; *Liston* v. *Keegan*, 9 L. R. Ir. 539; *Roche* v. *M'Dermott*, [1901] 1 I. R. 394; *Hearn* v. *Donnellan*, [1901] 1 I. R. at p. 402, note; *Murphy* v. *Hynes*, [1906] 1 I. R. 505—considered. *In re Greene, deceased*; *Fennelly* v. *Cheator* [M. R., 305

4.——*Dissenting Protestants — Unitarians — Religious doctrines—Usage for twenty-five years—Dissenters' Chapels Act*, 1844 (7 & 8 *Vict. c.* 45)—"*Congregation*"—*Meaning of—Annuity granted on charitable trust—Order for payment to Commissioners of Charitable Donations and Bequests.*] An annuity of £15 (Irish) charged on land was granted by deed made in 1761 to trustees, on trust to pay it to the Rev. J. P., or such other person as for the time being should have pastoral care of the congregation of Dissenting Protestants of the town of Clonmel, for or towards the support of such pastor. The congregation of Dissenting Protestants of which the Rev. J. P. was pastor were Presbyterians, and had a church in Nelson Street, Clonmel. A subsequent minister adopted Unitarian doctrines, and in 1827 the majority of the congregation seceded and built a church of their own in Clonmel, which was carried on in connection with the General Assembly of the Presbyterian Church in Ireland. The rest of the congregation continued to attend the Church in Nelson Street, in which thenceforth Unitarian doctrines were preached. The Unitarian congregation of Clonmel was one of the three congregations, viz., Dublin, Cork, and Clonmel, forming the Synod of Munster. The annuity was paid to the Unitarian minister for the time being

CHARITY—*continued.*
of the chapel without question. There was a resident minister down to 1882, after which date the services were conducted by visiting ministers. In 1911 the land on which the annuity was charged was sold under the Purchase of Land (Ireland) Acts; the annuity was redeemed, and the redemption price paid into the Court of the Irish Land Commission. A claim was then made to the redemption price on behalf of the Presbyterian congregation in Clonmel. The only persons then attending service in the church were three members of the family of the late resident minister, and one other person. *Held*, that inasmuch as no particular religious doctrines were required by the deed of trust to be taught, the provisions of the Dissenters' Chapels Act, 1844, applied, and that the usage for twenty-five years and upwards preceding the claim was conclusive evidence that Unitarian doctrines and mode of worship might properly be taught and observed in the church, and that the right of the minister to the annuity could not be called in question; (2) that there still was a congregation of Unitarians attending the church; and (3) that the trust fund should be paid over to the Commissioners of Charitable Donations and Bequests, and the income paid to the minister for the time being of the Unitarian congregation in Clonmel. *In re Hutchinson's Trusts* - - - M. R., 271

—— Unexpended funds—*Cy-près* - - 142
See BENEFIT SOCIETY.

CHILDREN — Portions — Vesting — Children other than son becoming entitled to estate before twenty-one—Younger son becoming entitled after twenty-one — Right to share in portion fund — Amount raisable - - - - - 222
See SETTLEMENT. 2.

CHURCH—Proprietary Church—Election of Churchwarden and Sidesmen 321, 344
See ECCLESIASTICAL LAW.

CHURCH OF IRELAND—Statutes and Constitution — Application to Proprietary Churches—Election of Churchwarden.
See ECCLESIASTICAL LAW. [321, 344

CHURCHWARDEN—Election of—Proprietary Church - - - - 321, 344
See ECCLESIASTICAL LAW.

CLAYTON'S CASE—Rule in - - 180
See MORTGAGE. 2.

COMMISSIONERS OF PUBLIC WORKS—Loan to occupier of land—Crown debt—Statute of Limitations - 124
See LIMITATIONS, STATUTE OF.

COMPANY—Mortgage or charge—Registration—Delivery warrants—Unregistered debentures issued after Companies Act, 1900, secured by unregistered trust deed executed before Act—Winding up—Appeal by liquidator without sanction of Court.
See PLEDGE. [389

—— Unregistered Company—Winding up—Unexpended funds - - - 142
See BENEFIT SOCIETY.

COMPENSATION—Compulsory powers.
See under COMPULSORY PURCHASE.

COMPULSORY POWERS.
See under COMPULSORY PURCHASE.

COMPULSORY PURCHASE—Costs of sale—Jurisdiction of Judicial Commission to award - - - - - - 248
See LAND PURCHASE ACTS. 2.

—— Evicted Tenants (Ireland) Act, 1907—Basis of price—Value to owner - 364
See LAND PURCHASE ACTS. 3.

—— Interest on compensation for land compulsorily acquired under Labourers Acts—Debt payable out of poor rate—Time within which action must be brought
See LOCAL GOVERNMENT. 1. [297

—— Lands held under fee-farm grant compulsorily acquired by district council—Compensation under £60—Prima facie evidence of title given by grantee—Receipt given by grantee—Right of district council to be registered as absolute owners in fee-simple free from fee-farm rent—Right of owner of rent to apply to county court for relief—Right to compensation out of insurance fund established by Local Registration of Title (Ireland) Act, 1891 - 65
See LOCAL GOVERNMENT. 5.

CONGREGATION—Number necessary to constitute - - - - - 271
See CHARITY. 4.

CONSTRUCTIVE TRUST—Person entering on lands of lunatic—New letting—Graft
See LUNATIC. [53

CONTEMPT OF COURT—Attachment—Order of Court of first instance reversed by Court of Appeal—Jurisdiction of Court of first instance to enforce by attachment order of Court of Appeal - - 30, 32
See PRACTICE. 2.

CONTRACT—*Sale of bonds—Rescission—Innocent misrepresentation.*] Bonds of a Dutch company, having property in America, were purchased on the faith of a representation that they were a charge on the property. They were not, in fact,

CONTRACT—*continued.*
a charge on the property, but the representation was made innocently. *Held*, that the sale would not be set aside. *Seddon* v. *The North Eastern Salt Company, Limited*, [1905] 1 Ch. 326, followed. *Lecky* v. *Walter* - - - - - M. R., 378

CONVERSION—*Land Judge—Absolute order for sale—Unsold real estate.*] An absolute order for the sale of real estate made by the Land Judge on the petition of an incumbrancer operates as a conversion of so much only of the lands as is required to be sold for the discharge of incumbrances. The remainder of the real estate if unsold remains and devolves as real estate. *Stinson's Estate*, [1910] 1 I. R., distinguished. *Sheane* v. *Fetherstonhaugh* - - - - Ross, J., 268

COSTS — Action against public body — Naming special defendants - - - - 16
See LOCAL GOVERNMENT. 2.

—— Equity Civil Bill—Suit relating to lands—"Subject-matter"—Higher scale 60
See COUNTY COURT.

—— Land Purchase Acts—Compulsory purchase—Jurisdiction to award costs of sale 248
See LAND PURCHASE ACTS. 2.

COTTAGE—Labourer's—Right of preference—Labourers (Ireland) Acts 16, 113, 118, 201, 208
See LOCAL GOVERNMENT. 2, 3, 4.

COUNTY COURT—*Costs—Equity Civil Bill—Suit relating to lands—"Subject-matter"—County Court Rules—Costs in Equity suits—Higher scale.*] In an equity civil bill to enforce payment of a mortgage by sale of the lands subject thereto, the plaintiff is entitled, unless the judge orders to the contrary, to have his costs taxed on the higher scale if the value of the lands exceeds £200, although the mortgage debt is under £200. *Tuite* v. *Cullen*. *Reilly* v. *Same* - Ross, J., 60

—— Labourers (Ireland) Act, 1906, s. 11—Claim to money paid to another person—Right to apply to County Court for relief 65
See LOCAL GOVERNMENT. 5.

COURT OF APPEAL—Order of—Jurisdiction of Court of first instance to enforce 30, 32
See PRACTICE. 2.

COURT OF FIRST INSTANCE—Jurisdiction to enforce order of Court of Appeal [30, 32
See PRACTICE. 2.

COVENANT—After-acquired property of wife—Covenant to settle—Gift from husband to wife - - - - - - 135
See SETTLEMENT. 1.

COVENANT—*continued.*
—— For title—Mortgage "as beneficial owner"—Notice of prior incumbrances—Marshalling - - - - - 180, 285
See MORTGAGE. 2, 3.

—— Waiver—Covenant to build not enforced for many years - - - - - 35
See LAND LAW (IRELAND) ACTS.

CROWN—Reversion on estate in tail male—Large number of male issue living—Sale under Land Purchase Acts—Distribution of purchase-money without regard to Crown reversion - - - - 96, 101
See LAND PURCHASE ACTS. 4.

—— Servants of — Commissioners of Public Works — Loan to occupier of land — Crown debt—Statute of Limitations 124
See LIMITATIONS, STATUTE OF.

CROWN DEBT—Debt due to Irish Land Commission—Priority - - - 175
See EXECUTOR.

—— Statute of Limitations—Board of Works loan - - - - - - 124
See LIMITATIONS, STATUTE OF.

CUMULATIVE LEGACIES—Several documents constituting will—Legacies whether cumulative or substitutional 158
See WILL. 5.

CY-PRÈS—Benefit Society—Dissolution—Unexpended funds - - - 142
See BENEFIT SOCIETY.

DAMAGE.
See SPECIAL DAMAGE.

DEATH DUTIES—Direction to pay legacy duty—Whether includes succession duty [76
See WILL. 2.

DEBENTURES — Company — Mortgage or charge — Registration — Unregistered debentures issued after Companies Act, 1900, secured by unregistered trust deed executed before Act - 389
See PLEDGE.

DEBT—Payable out of poor-rate—Time limit for recovery - - - - - 297
See LOCAL GOVERNMENT. 1.

—— Bequest of debts due at testator's death—Dividends declared after death—Apportionment - - - - - - 81
See WILL. 1.

—— Crown debt.
See under CROWN DEBT.

DELIVERY—Constructive—Delivery warrant [389
See PLEDGE.

DELIVERY WARRANT—Company—Mortgage or charge—Registration - 389
See PLEDGE.

DEPOSIT RECEIPT — Husband's money in joint names of husband, wife, and third party—Presumption of advancement 89
See HUSBAND AND WIFE.

DEVISE—Whether in fee or for life—Devise of portion of freehold farm to *A* without words of limitation, and subject to a rent—Devise of whole farm to *B* and *C* subject to tenancy bequeathed to *A* 86
See WILL. 3.

DISSENTERS — "Dissenting Protestants"—Whether term includes Unitarians — Religious doctrines—Usage for twenty-five years - - - - 271
See CHARITY. 4.

DISTRESS—Mountjoy Square Act—Non-payment of rate — Distress not exclusive remedy - - - - - 43
See MOUNTJOY SQUARE ACT.

DISTRICT COUNCIL.
See under LOCAL GOVERNMENT.

DIVIDENDS—Bequest of debts due at testator's death — Dividends declared after death—Apportionment - - 81
See WILL. 1.

ECCLESIASTICAL LAW—*Churchwardens—Sidesmen—Election of—Proprietary church—Irish Church Building Acts* (6 & 7 *Wm.* 4, *c.* 31); (3 & 4 *Vict. c.* 101); (12 & 13 *Vict. c.* 99); (14 & 15 *Vict. c.* 72)—*Irish Church Act*, 1869 (32 & 33 *Vict. c.* 42), *ss.* 12, 19, 20, 70—*Constitution of Church of Ireland, chap.* iii, *ss.* 1, 3.] The Irish Church Act, 1869, empowers a general synod of the Church of Ireland to frame constitutions and regulations for the management of the church and property and affairs thereof. By sect. 70, nothing in the Act is to affect the patronage or right of presentation to any proprietary church, or affect the property in any such church, or the property held for the purposes of or appropriated to the use of the same, or affect the continuance of the trust relating thereto as originally constituted. The proprietary church of St. John the Evangelist, Sandymount, was founded and endowed by private munificence by a lease and a deed of endowment and trust made in the year 1850, under the provisions of the Irish Church Buildings Acts (afterwards consolidated and amended by 14 & 15 Vict. c. 72). In the year 1913, the registered vestrymen of the church, at a meeting of the Easter vestry, elected one of their number, *J.*, as parishioners' churchwarden. The election of such

ECCLESIASTICAL LAW—*continued.*
churchwarden by the registered vestrymen was in accordance with the provisions for the election of churchwardens contained in the constitution of the Church of Ireland, framed by the general synod under the power conferred by the Irish Church Act, 1869, but was inconsistent with the trusts in the deed of endowment and the provisions of the Church Building Acts. At the same meeting the registered vestrymen appointed six of their number to be sidesmen. This practice of electing a parishioners' churchwarden and sidesmen by the vestrymen had been adopted immediately after the passing of the Irish Church Act, 1869, and followed for forty years. *Held*, by Barton, J.—(1) that the election of churchwardens of St. John's Church was governed by the provisions in the constitution of the Church of Ireland, and that the election of *J.* as churchwarden was valid; but (2) that no power to appoint sidesmen was given by the constitution of the Church of Ireland, or the trust deed, or the Church Building Acts, and that the election of the sidesmen was void and they should be restrained by injunction from acting as such. *Held*, by the Court of Appeal (reversing Barton, J., on the first point), that the effect of sect. 70 of the Irish Church Act, 1869, was to exclude a proprietary church such as St. John's from the provisions of the constitution of the Church of Ireland as to the appointment of churchwardens, and that the election of *J.* as churchwarden was void, and he should be restrained by injunction from acting as such. *Lefanu* v. *Richardson* - - BARTON J., 321; APP. 344.

EDUCATION—Charitable bequest—Perpetuity—Validity—Bequest to College for education of testators' relations—Preference to be given to most eligible and best conducted—Right of selection—Duty of College - - - - - 194
See CHARITY. 1.

EQUITY CIVIL BILL—To raise mortgage—Value of lands exceeding £200—Mortgage debt under £200—Costs—Higher scale - - - - - 60
See COUNTY COURT.

ESTATE FOR LIFE—Devise of portion of freehold farm to *A* without words of limitation and subject to a rent—Devise of whole farm to *B* and *C* subject to tenancy bequeathed to *A* - - - 86
See WILL. 3.

—— Devise to married woman—Property not to be mortgaged or sold—Separate use—Restraint on anticipation - - 111
See WILL. 4.

ESTATE TAIL—Crown reversion on estate in tail male—Large number of male issue living—Sale under Land Purchase Acts—Distribution of purchase-money without regard to Crown reversion - 96, 101
See LAND PURCHASE ACTS. 4.

ESTATES COMMISSIONERS.
See Cases under LAND PURCHASE ACTS.

ESTOPPEL—Mortgage—Transferee for value without notice—Negligence of mortgagor - - - - - - 123
See MORTGAGE. 4.

EVICTED TENANTS (IRELAND) ACT, 1907—Compulsory purchase—Basis of price—Value to owner - - 364
See LAND PURCHASE ACTS. 3.

EXECUTOR (AND ADMINISTRATOR)—*Administration — Crown debt — Priority — Irish Land Commission—Debt due to—Nature of—Purchase of Land (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 48) *s.* 5, *sub-s.* 2—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37) *s.* 12, *sub-s.* 1; *s.* 43—*Irish Land Act*, 1909 (9 *Edw.* 7, *c.* 42) *s.* 28, *sub-s.* 1.] *G.*, an Inspector and Assistant Commissioner of the Irish Land Commission, had in his hands certain moneys, which came to the Irish Land Commission from the Consolidated Fund, or from moneys provided by Parliament, to be applied to certain specific statutory purposes. Before he had applied the moneys to the statutory purposes, he died, and in a suit for administration his estate was found liable therefor to the Irish Land Commission. The Irish Land Commission claimed priority over the other creditors in respect of the debt thus arising, as a debt due to the Crown. *Held*, that the debt was a Crown debt, and was entitled to priority as such. *Greene* v. *Irish Land Commission* - - - - BARTON, J., 175

FAIR RENT—Right to have fixed—Pastoral holding—Lands in urban area—Covenant to build—not enforced for many years
See LAND LAW (IRELAND) ACTS. [36

FEE-FARM GRANT — Lands compulsorily acquired by district council under Labourers Acts — Prima facie evidence of title given by grantee—Compensation under £60—Receipt given by grantee—Right of district council to be registered as absolute owners in fee free from fee-farm rent—Right of owner of fee-farm rent to apply to county court for relief—Right to compensation out of insurance fund - - - - - - 65
See LOCAL GOVERNMENT. 5.

FEE-FARM RENT.
See under FEE-FARM GRANT.

FRAUD—Innocent third parties — which must suffer - - - - - - 123
See MORTGAGE. 4.

FRIENDLY SOCIETY.
See BENEFIT SOCIETY.

GARDEN—On roof of house—not a "garden" within meaning of s. 21 of Telegraph Act, 1863 - - - - - 9
See TELEGRAPH ACTS.

GRAFT—Person entering on lands of lunatic—New letting - - - - - 53
See LUNATIC.

HUSBAND AND WIFE—*Resulting trust — Presumption of advancement—Deposit receipt in names of husband, wife, and third party.*] *A.* placed on deposit receipt with his bankers the sum of £1200, his own money, in the names of himself, his wife, and his brother. By his will, made shortly afterwards, he left all his property to his wife and his brother for their lives, and after their deaths for charitable purposes. There was no evidence beyond the fact of the deposit to show *A's* intention in making it in the joint names. *Held*, that the presumption of advancement in favour of the wife was not affected by the insertion of the name of the brother in the receipt, and that he was trustee of the fund for her. *Eykyn's Trusts* (6 Ch. D. 115) followed. *In re Condrin*; *Colohan* v. *Condrin* - - - M.R. 89
—— Covenant to settle after-acquired property of wife—Gift from husband to wife 135
See SETTLEMENT. 1.
—— Restraint on anticipation—Devise—Property neither to be mortgaged nor sold 111
See WILL. 4.

INHERITANCE—Absence of words of—Devise—Wills Act, s. 28—Contrary intention
See WILL. 3. [86

INJUNCTION — Labourers (Ireland) Acts — Cottage—Right of preference 16, 113, [118, 201, 208
See LOCAL GOVERNMENT. 2, 3, 4.
—— Royal Arms—Unauthorized user - 236
See ROYAL ARMS.

INNOCENT PARTIES—Which must suffer from fraud of third party - 123
See MORTGAGE. 4.

INSURANCE FUND—Local Registration of Title (Ireland) Act, 1891, ss. 92, 93—Lands held under fee-farm grant compulsorily acquired by district council—Compensation under £60 — Right of council to be registered as absolute owner free from rent—Right of owner of rent to compensation out of insurance fund
See LOCAL GOVERNMENT 5. [66

INTEREST — Labourers Acts — Compulsory acquisition of land—Interest on compensation awarded—Claim payable out of poor rate — Time within which action must be brought - - - - 297
See LOCAL GOVERNMENT. 1.

—— Over-payment by mortgagor—Mistake of fact—Ignorance of proviso for reduction on punctual payment — Default in punctual payment—Effect as to rate of subsequent interest—Statute of Limitations - - - - - - 188
See MORTGAGE. 1.

IRISH CHURCH ACT, 1869 - 321, 344
See ECCLESIASTICAL LAW.

IRISH CHURCH BUILDING ACTS, 321, [344
See ECCLESIASTICAL LAW.

IRISH LAND COMMISSION—Land Purchase Acts—Compulsory Purchase—Jurisdiction of Judicial Commissioner to award costs of sale against Land Commission 248
See LAND PURCHASE ACTS. 2.

—— Moneys coming to, out of Consolidated Fund or provided by Act of Parliament for specific purposes—Crown debt - 175
See EXECUTOR.

—— Tithe rentcharge payable to—Tithe rentcharge subject to lease of which only short term unexpired—Redemption price
See LAND PURCHASE ACTS. 6. [302

JUDICIAL COMMISSIONER—Jurisdiction to award costs of sale on compulsory purchase under Land Purchase Acts 248
See LAND PURCHASE ACTS. 2.

LABOURERS (IRELAND) ACTS.
See under LOCAL GOVERNMENT.

LAND COMMISSION.
See under IRISH LAND COMMISSION.

LAND JUDGE—Absolute order for Sale—Conversion - - - - - - 268
See CONVERSION.

LAND LAW (IRELAND) ACTS—*Present tenancy—Pastoral holding—Lands within an urban area—Covenant to build—Not enforced for many years—Right to have fair rent fixed.*] A tenant held under a lease made in 1836, which contained a covenant to build certain houses on the land to form portion of a street of a town then in process of construction. No steps were ever taken towards the erection of the houses, and the tenant in fact used the lands as a pastoral holding in conjuction with another larger and adjoining farm. The holding was situate within an urban area. In 1911, the tenant duly applied to have a fair rent fixed. The Sub-Commission made an order declaring that the holding should be deemed a present tenancy, and fixing a fair rent. This decision was affirmed, on appeal, by the Land Commission. *Held*, that as the lands were in fact pastoral, and had always been used as such, the existence of a covenant to build, not acted on for over seventy years, did not prevent the tenancy from being a pastoral holding in respect of which a fair rent could be fixed. *Held*, by Cherry, L. J., that the covenant must be presumed to have been waived by the acts of the parties, and that on this ground the tenant was entitled to succeed in a fair-rent application. *Midleton, Landlord*; *Wallis, Tenant*. [APP., 35

LAND PURCHASE ACTS—*Advance—Agreement for sale of entire holding—Subsequent division—Separate advances—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *ss.* 1, 15.] In 1906 a landlord agreed with his tenants for the sale of his estate, including a holding held subject to a judicial yearly rent of £17 fixed by agreement in 1897, the price agreed on for this holding being £437. No purchase agreement was, however, lodged in the Land Commission at this figure, but the landlord consented to the tenant signing two separate purchase agreements for two separate divisions of the holding at apportioned rents of £10 and £7 respectively, and at the prices of £257 and £180 respectively. These sums the Estates Commissioners refused to advance, they not being satisfied with the security of the separate divisions of the holding. If the original agreement had been carried out, the case would have been within the provisions of sub-s. 1 of sect. 1 of the Irish Land Act, 1903. On the hearing of a question of law submitted by the Estates Commissioners: *Held*, by the Court of Appeal (reversing the decision of Wylie, J.), that the divided portions of the holding did not come within the provisions of sub-s. 1 of sect. 1 of the Act of 1903, and that the Estates Commissioners were at liberty to refuse to sanction the advances sought for. *In re Nash's Estate* APP., 290.

2.——*Compulsory purchase — Costs of sale — Superior interest—Costs of redemption—Jurisdiction of Judicial Commissioner to award costs—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 50—*Irish Land Act*, 1909 (9 *Edw.* 7, *c.* 42), *part* iv—*Land Commission Rules of* 16*th March*, 1897, *Order XLVI, Rule* 1.] The Judicial Commissioner has discretionary power under Order XLVI, Rule 1, of the Land Commission Rules of 16th March, 1897, made pursuant to sect. 50 of the Land Law (Ireland) Act, 1881, to award the costs of sale and of the redemption of superior interests as against the Land Commission

LAND PURCHASE ACTS—*continued.*

to an owner of lands which have been compulsorily acquired by the Estates Commissioners under the provisions of Part IV of the Irish Land Act, 1909. *In re Lord Inchiquin's Estate* [APP., 248

3.——*Compulsory purchase — Evicted Tenants (Ireland) Act*, 1907—*Price*—*Estates Commissioners — Value to the owner.*] In the case of lands compulsorily acquired by the Estates Commissioners under the Evicted Tenants (Ireland) Act, 1907, the sum which the owner is entitled to be paid should represent, not the price which might reasonably be obtained upon a voluntary sale in the open market, but the value of the lands to the owner. So held by the Court of Appeal, O'Brien, L.C., and Holmes, L.J.; Cherry, L.C.J., dissenting. *In re Grant's Estate* (No. 2) - - APP., 364

4.——*Superior interest—Redemption of—Crown reversion on estate in tail male—Large number of male issue living—Distribution of purchase-money without regard to Crown reversion—Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 31, *sub-s.* 5—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 98, *sub-s.* 2.] The Crown was entitled to a reversion expectant on the determination of an estate in tail male in lands sold under the Land Purchase Acts. At the date of the sale there were living seventeen male issue of the original tenant in tail. *Held*, by the Court of Appeal, that the reversion was of no appreciable value, and might, without the consent of the Crown, be disregarded in the distribution of the purchase-money. *In re Earl of Carysfort's Estate* [WYLIE, J., 96; APP., 101

5.——*Tithe rentcharge—Impropriate—Redemption—Value— Element of variation — Tithe rentcharge (Ireland) Act*, 1900 (63 & 64 *Vict. c.* 58), *ss.* 2 *and* 3.] On an application to redeem and fix the redemption-price of an impropriate tithe rentcharge of £8 9*s.* 4*d.* payable out of lands situated in Co. Meath, and secured on a second-term rental of £304, where it appeared from the tables compiled from the appendices to the reports annually published by the Land Commission that the percentage of variation in Co. Meath of judicial rents payable during a second or subsequent statutory term, as compared with judicial rents payable during the last preceding statutory term, for the thirteen years subsequent to the passing of the Tithe Rentcharge (Ireland) Act, 1900, was 12·6 per cent., and on the assumption that at the end of the statutory period of fifteen years the percentage of variation would be in or about 12 per cent., the redemption-price was fixed at £190, on the basis of a well-secured rentcharge of £8 9*s.* 4*d.*, payable for two years, and then of £7 9*s.*, payable in perpetuity. *In re Blackburne's Estate* [WYLIE, J., 1

LAND PURCHASE ACTS—*continued.*

6. —— *Tithe rentcharge subject to a lease where short term unexpired — Tithe rentcharge "payable to the Land Commission"—Redemption — Consent of Treasury — Land Law (Ireland) Act*, 1887 (50 & 51 *Vict.* c. 33), *s.* 15, *sub-s.* 3 — *Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *s.* 37, *sub-s.* 1 — *Tithe rentcharge (Ireland) Act*, 1900 (63 & 64 *Vict. c.* 58), *s.* 9—*Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 64 — *Land Commission Rules of 2nd July*, 1910, *Order VIII, Rule* 4.] By a lease made in 1833, certain rectorial tithes, subsequently varied under s. 3 of the Tithe Rentcharge (Ireland) Act, 1900, were demised for a term of 104½ years subject to a rent. This rent, and the reversion in the tithes expectant on the determination of the lease, subsequently became vested in the Land Commission. Portion of the lands subject to the tithes were sold under the Land Purchase Acts. On a question arising as to the redemption price of the tithes issuing out of the lands sold—*Held*, following *In re Maunsell's Estate* (MacC. 103), that the tithes were "payable to the Land Commission" within the meaning of section 15, sub-sect. 3, of the Land Law (Ireland) Act, 1887, and that the redemption price that should be allowed was the price settled by the Treasury consent, *i.e.* 22½ years' purchase. *In re Locke's Estate* - - - - WYLIE, J., 302

7. —— *Trustee — Sale of settled lands—English Public Trustee sole existing trustee of the settlement —Payment out to him of the residue—Public Trustee Act*, 1906 (6 *Edw.* 7, *c.* 55), *s.* 5, *sub-s.* 1.] Where Irish lands, subject to the trusts of an English settlement, were sold under the Land Purchase Acts, and it appeared that the English Public Trustee had been appointed sole trustee of the settlement by the person thereby nominated for the purpose of appointing trustees, and that the settlement authorized a sole trustee to receive capital moneys arising under the Settled Land Acts, the residue of the purchase-moneys arising from such sale were paid out to the English Public Trustee. *In re Leslie's Hassop Estates*, [1911] 1 Ch. 611, applied and followed. *Quære*:—Has the Court power to appoint the English Public Trustee trustee of a settlement in his capacity as such Public Trustee? *In re Ardagh's Estate* [WYLIE, J., 5

—— Money payable to Land Commission out of Consolidated Fund, or from moneys provided by Parliament, for statutory purposes—Crown debt—Priority - 175
See EXECUTOR.

LANDLORD AND TENANT.
See under LAND LAW (IRELAND) ACTS.
LAND PURCHASE ACTS.

LEGACIES — Whether cumulative or substitutional - - - - - - 158
See WILL. 5.

LEGACY DUTY—Direction to pay legacy free of—Whether covers succession duty 76
See WILL. 2.

LEGATEE—Bequest of residue to "the several legatees other than charitable legatees hereinbefore named" — Non-charitable legacy given by subsequent clause in will—Right of such legatee to share of residue - - - - - - 76
See WILL. 2.

—— Whether includes devisee - - 76
See WILL. 2.

LIFE ESTATE.
See under ESTATE FOR LIFE.

LIMITATION—Absence of words of—Devise—Wills Act, s. 28—Contrary intention 86
See WILL. 3.

LIMITATIONS, STATUTE OF—*Crown debt—Servants of the Crown—Commissioners of Public Works—Loan to occupier—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 31, *sub-s.* 2—*Landed Property Improvement (Ireland) Act*, 1847 (10 & 11 *Vict. c.* 32.] A loan made to an occupier of land by the Commissioners of Public Works acting in execution of the Land Law (Ireland) Act, 1881, s. 31, sub-s. 2, and the provisions of the Landed Property Improvement (Ireland) Acts made applicable thereto by Treasury Minute, is a Crown debt, and as such is not barred by the Statute of Limitations. Decision of the Master of the Rolls ([1913]1 I. R. 455) reversed. *Attorney-General* v. *Howley* - - - APP. 124

—— Debt payable out of poor rate—Interest on compensation awarded for land compulsorily acquired under Labourers Acts—Time within which action must be brought—Local Government (Ireland) Act, 1898, s. 51, sub-s. 7 - 297
See LOCAL GOVERNMENT. 1.

—— Mistake of fact—Overpayment of interest on mortgage—Right to recover or set off overpayments after lapse of six years 188
See MORTGAGE. 1.

—— Mortgage—Welsh mortgage—Incorporation in deed of statutory power of sale 23
See MORTGAGE. 5.

LIQUIDATOR — Company — Winding-up — Appeal by liquidator without sanction of Court - - - - - - 389
See PLEDGE.

LOAN—Board of Works loan to occupier of land—Crown debt—Statute of Limitations - - - - - - 124
See LIMITATIONS, STATUTE OF.

LOCAL GOVERNMENT—*Labourers (Ireland) Acts—Compulsory acquisition of land—Interest on compensation—Debt payable out of the poor rate—Limited time for payment—Debt not recoverable—Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *s.* 51, *sub-s.* 7—*Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70, *Schedule II, Art.* 24).] A rural district council was authorized to acquire a number of plots on a certain estate for the purposes of the Labourers Acts. After the amount of compensation to be paid by the council for these plots had been fixed by arbitration, the council went into possession, the owners not objecting. Difficulties occurred in connection with the title, and there was considerable delay. Ultimately, on August 1st, 1913, the council lodged in Court the amount of the compensation awarded. On February 10th, 1914, the owners of the estate presented a petition in the Chancery Division asking to have the amount transferred to a certain credit, and also claiming a declaration that they were entitled to interest at 5 per cent. on the amount of compensation awarded, from the date on which the council went into possession till the date of lodgment. *Held*, that the claim for interest was a "debt, claim, or demand" which was directly or indirectly payable out of the poor rate, and not having been paid within the half year in which it became due or within three months afterwards, and no legal proceedings having been commenced within that time, it was barred by sect. 51, sub-s. 7, of the Local Government (Ireland) Act, 1898. *In re Borrisokane Rural District Council; Ex parte Higginbotham and Others* BARTON, J., 297

2.——*Labourers (Ireland) Acts—Improvement Scheme—Application for letting of cottage—Right of preference—Scheme not founded on applicant's representation — Special damage — Joinder of Attorney-General—Labourers (Ireland) Act*, 1883 (46 & 47 *Vict. c.* 60), *s.* 13—*Labourers (Ireland) Act*, 1906 (6 *Edw.* 7, *c.* 37), *s.* 29—*Practice—Action against public body—Naming special defendants—Costs.*] The defendants had acquired a plot of land under an improvement scheme under the Labourers (Ireland) Acts, and built a cottage on it. The plaintiff, who was an agricultural labourer, but who had not signed the representation on which the scheme was founded, and was not one of the persons on whose representation it was founded, applied to the defendants to have the first letting of the cottage made to him. No other person, qualified to have a letting made to him

under the Acts, applied for a letting. The defendants rejected the plaintiff's application, and let the cottage to a person not an agricultural labourer. The plaintiff having brought an action claiming an injunction and damages, *Held*, that as no private legal right of the plaintiff had been infringed, he could not sustain the action. *Held*, also, that even if the Attorney-General were joined as a plaintiff, the action would not be maintainable. *Tevlin* v. *Lisnaskea Rural District Council*, [1914] 2 I. R. 15, distinguished. When misconduct in the performance of their duties is alleged against a public body, and it becomes necessary to take legal proceedings against them, the individual members who are principally responsible ought to be made special defendants for the purpose of visiting them with the costs of the action. *O'Shea* v. *Cork Rural District Council* - - M.R., 16

3. —— *Labourers (Ireland) Acts—Improvement scheme—Application for letting of cottage—Right of preference on first letting of particular cottage—Labourers (Ireland) Act*, 1906 (6 *Edw.* 7, *c.* 37), *s.* 29.] Representations under the Labourers (Ireland) Acts were, on behalf of certain labourers, made to a district council, representing that there were not sufficient houses in certain electoral divisions, and suggesting the building of cottages for the labourers mentioned in the representations. One of these representations was made on behalf of the plaintiff, and suggested the building of a cottage on a site in the townland of B. The council thereupon made a scheme, in pursuance of which they acquired a plot in the townland of B., and built ten cottages thereon. Under the same scheme they also acquired other plots in an adjoining townland and erected cottages thereon. The council had made regulations under sect. 29 of the Labourers Act, 1906, providing for a preference on the first letting of cottages comprised in the scheme to be given to labourers who had signed the representation on which the scheme was founded. *Held*, by the Court of Appeal (affirming the decision of Ross, J.), that the plaintiff, assuming that he had a right of preference to some one of the cottages included in the scheme, was not entitled to a preferential right to a particular cottage, or to one of the particular cottages erected on the townland specified in the representation signed by him. *Condon* v. *Mitchelstown Rural District Council*

[Ross, J., 113; APP., 118

4. —— *Labourers (Ireland) Acts—Improvement scheme—Application for letting of cottage—Right of preference—Labourers (Ireland) Act*, 1906 (6 *Edw.* 7, *c.* 7), *s.* 29.] A district council had acquired land under an improvement scheme, made under the Labourers (Ireland) Acts, and founded on "representations" made by certain agricultural labourers, of whom the plaintiff was one. When eight cottages, out of a large number comprised in the scheme, had been built, the council allotted one of them to a labourer who had not signed any of the "representations" on which the scheme was founded, but whose needs for a cottage were pressing. Prior to the erection of the remaining cottages under the scheme, the plaintiff brought an action against the council to establish his alleged preferential right to a cottage under sub-s. 2 of sect. 29 of the Labourers (Ireland) Act, 1906, and claiming an injunction and damages. *Held*, by the Court of Appeal (reversing the decision of the Master of the Rolls, who had decided in favour of the preferential right of the plaintiff, and had awarded him £30 damages), that the council was entitled, in the bona fide exercise of its discretion, to allot a cottage to the labourer whose needs were more urgent than the plaintiff's, notwithstanding that the latter had signed a representation, while the successful claimant had not, and that the action should be dismissed. *Marron* v. *Cootehill* (No. 2) *Rural District Council*

[M.R., 201; APP., 208

5. ——*Labourers (Ireland) Acts—Lands under fee-farm grant compulsorily acquired by district council—Compensation under £60—Prima facie evidence of title given by grantee—Receipt given by grantee—Right of district council to be registered in local register of title as absolute owner in fee-simple free from the fee-farm rent—Right of owner of rent to apply to county court for relief—Right of such owner to compensation out of insurance fund—Labourers (Ireland) Act*, 1906 (6 *Edw.* 7, *c.* 37), *s.* 11, *sub-ss.* 1, 4, 6; *s.* 21—*Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict.* c. 66), ss. 92, 93.] A rural district council acquired compulsorily under the Labourers Acts a plot of land which was held under a fee-farm grant, and was, with other lands, subject to a fee-farm rent created by a fee-farm grant made in the year 1771. B. was tenant for life of the lands subject to the fee-farm rent, and had given to the district council prima facie evidence that she was a person having power to sell under the Land Purchase Acts, and had satisfied them that for six years previously she had been in possession. The sum of £8 16*s.* was awarded as compensation to B., and was duly paid to her, and she gave the district council a receipt in the form prescribed by the Labourers (Ireland) Order, 1906, in pursuance of sect. 11, sub-s. 4, of the Labourers (Ireland) Act, 1906. No compensation was awarded by the arbitrator to the owner of the rent reserved by the fee-farm grant, nor was any release or receipt executed by him. On an application under the Local Registration of Title (Ireland) Act, 1891, by the district council, for first registration, *Held*,

LOCAL GOVERNMENT—*continued.*

that the effect of the receipt was to vest absolutely in the district council the fee-simple of the land, and that they were entitled to be registered as absolute owners thereof in fee-simple, free from burdens.

The remedy of the owner of the rent in such case is to apply to the County Court Judge for relief under s. 11, sub-s. 6, of the Labourers Act, 1906.

Quære: Has he a claim to compensation out of the insurance fund established by the Local Registration of Title (Ireland) Act, 1891? *In re Limerick* (*No.* 1) *Rural District Council*

MADDEN, J., 65.

LUNATIC—*Entry on lands of—Bailiff—New letting—Constructive trust—Graft.*] The doctrine applicable to entry on the lands of a minor applies also to entry on the lands of a lunatic. A person entering on the lands of a lunatic, with notice of the lunacy and of the rights of the lunatic, becomes a bailiff in respect of the lunatic's estate in the lands, and where the lands are held by the lunatic under a contract of tenancy, and a new letting is subsequently made to the person so entering, such new letting will be deemed a graft on the old tenancy. *Farrell* v. *Maher* (42 I. L. T. R. 156) not followed. *Smyth* v. *Byrne* - - - - - - APP., 53

MARKET — Compulsory purchase — Evicted Tenants (Ireland) Act, 1907—Price—Sale in open market - - 364
See LAND PURCHASE ACTS. 3.

MARRIAGE SETTLEMENT—
See under SETTLEMENT.

MARRIED WOMAN—
See under HUSBAND AND WIFE.

MARSHALLING—Mortgage to bank to secure current account—Subsequent mortgage—Appropriation of payments—Rule in *Clayton's Case* - - - - 180
See MORTGAGE. 2.

——Successive charges on both or one of two funds—Notice - - - - 285
See MORTGAGE. 3.

MISREPRESENTATION—Executed contract — Rescission — Innocent misrepresentation. - - - - - - 378
See CONTRACT.

MISTAKE — Overpayment of interest on mortgage—Ignorance of proviso for reduction on punctual payment—Statute of Limitations - - 188
See MORTGAGE. 1.

MONASTIC ORDER—Bequest to—Validity of.
See CHARITY. 2, 3. [76, 305

MORTGAGE—*Overpayment of interest by agent of mortgagor—Mistake of fact—Ignorance of proviso for reduction of interest on punctual payment—Proviso for reduction of interest on payment within twenty-one days after each of days appointed—Default in punctual payment—Effect as to subsequent interest—Statute of Limitations — Common Law Procedure* (*Ireland*) *Act*, 1853 (16 & 17 *Vict. c.* 113), *s.* 20.] By an order made in a Land Judge's matter in 1888, the receiver was directed to pay the several persons mentioned in the schedule thereto the interest on their several charges therein stated. Amongst these was a mortgage stated to bear interest at 6 per cent. payable on certain days. No mention was made of the fact that the 6 per cent. was reducible to 5 per cent. if paid within twenty-one days after each of such days respectively. The schedule to the order was in accordance with the schedule to the affidavit, upon which the order was made, of the solicitor having carriage. The receiver, being unaware that there was any provision in the mortgage for the reduction of interest, paid the interest at the rate of 6 per cent., whether within twenty-one days of each gale day or not, and, on the dismissal of the petition in 1902, continued to pay interest in the same way as agent for the mortgagor. It appeared that the mortgagee was also unaware of the proviso in the mortgage for the reduction of interest. The lands subject to the mortgage were subsequently sold under the Land Purchase Acts, and, in 1912, the order attaching claims to the purchase-money was made. It was only on the vouching of the mortgagee's claim that it was first discovered that interest was reducible on punctual payment. On a question arising as to the rights of the parties: *Held*, that each overpayment of interest was a voluntary payment made by the mortgagor to the mortgagee under a mistake of fact, and without consideration; that, upon its receipt by the mortgagee, the latter became indebted to the mortgagor in that amount; that, following *In re Rorella's Estate* (32 I. L. T. R. 8), and *In re Carroll's Estate* ([1901] 1 I. R. 78), the benefit of the proviso for reduction of interest was not entirely lost by the first default of payment within twenty-one days; and that on the vouching of the mortgagee's claim, the mortgagor was entitled to set off the sums so overpaid within the previous six years, but that the right to set off the sums overpaid prior to that was barred by the Statute of Limitations. *In re Jones's Estate* - - - WYLIE, J., 188

2. —— *Priority — Appropriation of payments—Rule in Clayton's Case — Marshalling securities—Mortgage to bank to secure present and future advances—Subsequent mortgage by mortgagor "as beneficial owner."*] *Q.* in 1894 mortgaged certain

MORTGAGE—*continued.*
lands and a policy of assurance to a bank to secure all moneys then due, or to become due, with interest. In 1897 he, "as beneficial owner," mortgaged the lands, but not the policy, to *F.* to secure £700 and interest. F. had notice at the time of the prior mortgage to the bank. Notice of the mortgage to F. was given by F. to the bank on the 17th March, 1897, when a sum of £1963 was due by *Q.* to the bank, for which he had given them promissory notes payable three months after date. The bank continued the account with Q. as one unbroken account, instead of opening a fresh account. The notes had been originally given in 1895 and 1896, and were renewed from time to time down to 1903, and since remained unpaid. The practice had been that when the notes became due they were debited to Q.'s current account, were at once renewed, and the amount credited to the account. Subsequent to the 17th March, 1897, *Q.* paid into his current account in the bank £4000 in cash. His account with the bank was closed on the 30th June, 1904, and then showed an overdraft due to the bank of £1654 in addition to the amount due on foot of outstanding notes. *Q.* died in 1908. *Held*, that the rule in *Clayton's Case* (1 Mer. 572) was not excluded by the conduct of the parties, and that *F.*'s mortgage had priority as against the lands to the bank's charge.

On *Q.*'s death the bank received the amount of the policy moneys, and claimed to be entitled to apply them towards the discharge of the amount of the overdraft due on the 30th June, 1904, with interest, leaving the sum of £1963 and interest still charged on the mortgaged lands.

Held, that *F.* had the right to compel the bank to discharge *pro tanto* the debt due to them on the 17th March, 1897, out of the policy moneys, in exoneration of the lands subject to *F.*'s mortgage. *In re Chute's Estate* - - Ross, J., 180

3. —— *Priority — Marshalling — Successive charges on both or one of two funds—Deficiency of funds—Notice.*] *B.* was entitled to a first charge on two funds "A" and "B" appearing on the final schedule of incumbrances affecting the purchase-money of lands sold under the Land Purchase Acts. *C.* was entitled to a second charge on fund "B" only. *B.* subsequently took a further charge on funds "A" and "B"; and after that *L.* acquired a charge on fund "A" only. Each had notice of all the prior charges. It appeared that if B.'s first charge were paid rateably out of both funds, the residue of fund "B" would be insufficient to pay *C.*'s second charge in full. *Held*, that *C.* was entitled to marshal *B.*'s first charge, and to have so much of it paid out of fund "A" as would leave sufficient of fund "B" to pay his own second charge in full, notwithstanding the fact that *L.*'s

MORTGAGE—*continued.*
puisne charge would be thereby prejudiced. *In re Archer's Estate* - - - Wylie, J., 285

4. —— *Priority — Transfer — Transferee for value without notice — Negligence of mortgagor— Fraud of mortgagee— Equities as between mortgagor and transferee — Two innocent parties— Which must suffer from fraud of third party — Estoppel.*] Judgment of Ross, J., [1913] 1 I.R. 506, affirmed. *In re Ambrose's Estate* - - - App., 123

5. ——*Statute of Limitations—Welsh mortgage —Inclusion in mortgage deed of power of sale— Real Property Limitation Act*, 1874 (37 & 38 *Vict c.* 57), *s.* 7.] In the year 1890, *A*, by deed conveyed certain lands to *B* and *C*, as tenants in common in fee-simple, to secure a sum of £300, therein recited to be due, with a proviso for redemption on payment of the principal money, the deed being silent as to interest. There was a provision that the powers and remedies conferred on mortgagees by the Conveyancing and Law of Property Act, 1881, were thereby given to *B.* On the execution of the deed, *B* and *C* went into possession, and had since remained in possession without accounting to *A* for the rents and profits, or having given any acknowledgment in writing of his title. *Held*, that the express inclusion in the deed of a power of sale showed that it was not intended to operate as a Welsh mortgage, and that *A.*'s right to redeem was barred by the Statute of Limitations. *In re Cronin* - Madden, J., 23

—— Company—Mortgage or charge—Registration —Delivery warrants—Debentures 389
See Pledge.

—— Equity civil bill to raise—Value of lands exceeding £200 — Mortgage debt under £200—Costs—Higher scale - 60
See County Court.

MOUNTJOY SQUARE ACT—*Rates—Statute — Construction — Statutory remedy not exclusive remedy — Payment of rate charged on premises enforceable by receiver or sale—Mountjoy Square Act*, 1802 (42 *Geo.* 3, *c.* xxxiv).] The Mountjoy Square Act of 1802 (42 Geo. 3, c. xxxiv), s. 5, provides that each house or piece of ground specified in the schedule to the Act shall be chargeable with, liable to, and the same was thereby charged with, a yearly rate to be made by the Commissioners of the Square. Section 6 empowers the Commissioners to collect and levy such rate, and, in default of payment of any rate thereby charged upon such house or piece of ground, to enter and levy the same by distress or sale of the goods of the inhabitant occupier or proprietor of such house or ground. *Held*, following *Commissioners of Mountjoy Square* v. *Walsh*, [1914] 1 I.R. p. 50, *note*, that the remedy of the Commissioners for enforcing payment of the rate was not limited to

MOUNTJOY SQUARE ACT—*continued.*
the statutory remedy of distress, but that they were entitled to a charge on the house of the owner enforceable by a receiver or sale. *Commissioners of Mountjoy Square* v. *Morrin* - - M.R., 43

NEGLIGENCE—Of mortgagor, enabling fraud to be committed by mortgagee—Rights of transferee for value - - - 123
See MORTGAGE. 4.

NOTICE—Covenants for title—Notice of prior incumbrances—Marshalling 180, 285
See MORTGAGE. 2, 3.

—— Purchaser for value without—Mortgage—Negligence of mortgagor — Fraud of mortgagee—Transfer to transferee for value without notice - - 123
See MORTGAGE. 4.

ORDER—Amendment—Accidental slip 73
See PRACTICE. 1.

—— Land Judge—Absolute order for sale—Conversion - - - - - - 268
See CONVERSION.

OVERPAYMENT—Interest on mortgage—Mistake of fact—Ignorance of proviso for reduction on punctual payment—Statute of Limitations - - 188
See MORTGAGE. 1.

PARTIES—Action against public body—Naming special defendants - - 16
See LOCAL GOVERNMENT. 2.

—— Attorney-General—Joinder of - 16
See LOCAL GOVERNMENT. 2.

PASTORAL HOLDING—Lands in urban area—Covenant to build—Not enforced for many years — Waiver — Present tenancy - - - - - - 35
See LAND LAW (IRELAND) ACTS.

PLEASURE GROUND—Meaning of, in s. 21 of the Telegraph Act, 1863 - 9
See TELEGRAPH ACTS.

PLEDGE — *Constructive delivery — Delivery warrant—Whiskey stored in distiller's warehouse—Company—Bill of sale—Registration—Mortgage or charge—Debentures—Unregistered debentures issued after commencement of Companies Act*, 1900, *secured by trust deed executed before Act—Winding up—Appeal by liquidator—Sanction of Court—Bills of Sale (Ireland) Act*, 1879 (42 & 43 *Vict. c.* 50), *s.* 4—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 14—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 151.] Order of Court of Appeal, affirming the order of Barton J., in *Doherty* v. *Kennedy*, [1912] 1 I. R. 349, 363, reversed in so far as it declared that the respondent was entitled to a valid pledge of the whiskey comprised in the delivery warrants, and that such

PLEDGE—*continued.*
warrants did not require registration. Order affirmed in so far as it declared the respondent entitled to a lien for the amount of his advances on the debentures, although unregistered, issued to him after the commencement of the Companies Act, 1909, to the extent of the property comprised in the trust deed (unregistered) executed in 1895, securing such debentures.

A preliminary objection having been taken by the respondent that the appeal was incompetent inasmuch as leave to appeal had not been obtained from Barton, J., by the liquidator, under sect. 151 of the Companies (Consolidation) Act, 1908, which, in case of a winding up by the Court in Ireland, empowers a liquidator with the sanction of the Court to bring or defend legal proceedings in the name and on behalf of the company, *Held* that the section does not confer on third parties any right to object to proceedings brought by a liquidator in the name of the company on the ground that the sanction of the Court has not been obtained, and that leave to appeal was not necessary. *Dublin City Distillery, Limited* v. *Doherty* - - - - - H. L., 389

POOR RATE—Debt payable out of—Interest on compensation awarded for land compulsorily acquired under Labourers Acts—Time within which action must be brought - - - - - 297
See LOCAL GOVERNMENT, 1.

PORTIONS — Vesting — Younger children—Children other than son becoming entitled to estate before twenty-one—Younger son becoming entitled after attaining twenty-one—Right to share in portion fund—Amount raisable - 222
See SETTLEMENT. 2.

POWER OF ANTICIPATION.
See ANTICIPATION.

POWER OF SALE—Inconsistent with Welsh Mortgage - - - - 23
See MORTGAGE. 5.

PRACTICE—*Amendment of error in order—Error arising from accidental slip of party seeking to amend order—Order XXVIII, Rule* 11.] The Court has jurisdiction to correct an error in an order arising from an accidental slip on the part of the person who obtained the order and seeks to have it corrected, although there was no error in the sense that the order as made did not carry out the intention of the Court. The plaintiff had obtained on notice of motion an order, which was passed and entered, that the defendant *S* should pay to the plaintiff a certain sum less by a sum of £199 which had been already paid into Court. The order followed the terms of the plaintiff's

PRACTICE—*continued.*

notice of motion, which by mistake gave *S* credit for the whole of the sum of £199, he being in fact entitled to credit for only one-half of such sum. The Court, on the application of the plaintiff, amended the order by substituting for the words "less by the sum of £199," the words, "less by one moiety of the sum of £199." *Chessum and Sons* v. *Gordon*, [1901] 1 Q.B. 694, applied and followed. *M'Caughey* v. *Stringer and Mahaffy* - - - - - - M.R., 73

2. —— *Contempt of Court—Attachment—Order of Court of first instance reversed by Court of Appeal—Jurisdiction of Court of first instance to enforce by attachment the order of the Court of Appeal—Order XLII, Rule 7.*] By an order of the Master of the Rolls the defendants were restrained from proceeding further with the erection and completion of a certain building which the plaintiff alleged obstructed the light coming through his ancient windows. The plaintiff appealed from this order on the ground that it did not include a mandatory injunction commanding the defendants to pull down the building complained of. The Court of Appeal discharged the order of the Master of the Rolls, and ordered the defendants to have the building complained of forthwith pulled down. The defendants disobeyed this order, and the plaintiff thereupon applied to the Master of the Rolls for a writ of attachment for contempt of Court to issue against them. The Master of the Rolls refused the application, being of opinion that the contempt of which the defendants had been guilty was a contempt of the Court of Appeal, and that he accordingly had no jurisdiction to punish it. On an appeal from this decision to the Court of Appeal: *Held*, that the Master of the Rolls had jurisdiction to make the order sought for, and that, as the plaintiff was entitled to the order, the issue of a writ of attachment should be directed by the Court of Appeal, not in the exercise of an exclusive jurisdiction, but by way of reversal of the order of the Master of the Rolls. *Fortescue* v. *M'Keown*

[M.R., 30; App., 32

3. —— *Receiver — Duties of—Difficulty arising in execution of receivership—Application to Court.*] Where a receiver is appointed by the Court in an action, and a difficulty arises in the execution of his duties, he ought, as a general rule, to submit the matter to the party having carriage, who is the proper person to bring it before the Court. The receiver should not himself bring the matter before the Court, except under special circumstances. *Windschuegl* v. *Irish Polishes, Limited*

Barton, J., 33

—— Action against public body—Naming special defendants - - - - - 16
See Local Government. 2.

PRESENT TENANCY — Pastoral holding — Lands in urban area—Covenant to build —Not enforced for many years—Waiver of covenant - - - - - 35
See Land Law (Ireland) Acts.

PRIORITY—
See Crown Debt, Mortgage.

PROPRIETARY CHURCH — Election of churchwardens and sidesmen 321, 344
See Ecclesiastical Law.

PUBLIC BODY — Action against — Naming special defendants - - - - 16
See Local Government. 2.

PUBLIC TRUSTEE — Settled lands in Ireland sold under Land Purchase Acts—English Public Trustee sole trustee of settlement —Payment of purchase-money to him 5
See Land Purchase Acts. 7.

PUBLIC WORKS—Commissioners of—Loan—Statute of Limitations - - 124
See Limitations, Statute of.

PURCHASER — For value without notice — Mortgage — Negligence of mortgagor — Fraud of Mortgagee—Transfer to transferee for value without notice 123
See Mortgage. 4.

RATE—Mountjoy Square rate—Enforcing payment by receiver or sale — Statutory remedy not exclusive remedy - 43
ee Mountjoy Square Act.

—— Poor rate—Debt payable out of—Interest on compensation awarded for land compulsorily acquired under Labourers Acts — Time within which action must be brought - - - - - - 297
See Local Government. 1.

REAL ESTATE—Conversion—Absolute order for sale - - - - - 268
See Conversion.

RECEIVER—Difficulty arising in execution of his duties — Proper person to apply to Court - - - - - - 33
See Practice. 3.

REDEMPTION—Superior interest.
See under Superior Interest.

REGISTRATION — Company — Mortgage or charge—Delivery warrants—Debentures [389
See Pledge.

RELIGIOUS DOCTRINES—Trust for Dissenting Congregation—Usage—Doctrines taught for twenty-five years - 271
See Charity. 4.

REPRESENTATION—Innocent misrepresentation—Executed contract—Rescission
See CONTRACT. [378

RESCISSION — Executed contract — Innocent misrepresentation - - - 378
See CONTRACT.

RESTRAINT ON ANTICIPATION.
See under ANTICIPATION.

RESULTING TRUST—Benefit society—Dissolution—Unexpended funds - 142
See BENEFIT SOCIETY.

—— Presumption of advancement—Husband and wife—Husband's money put on deposit receipt in names of husband, wife, and third party - - - - - 89
See HUSBAND AND WIFE.

REVENUE — Direction to pay legacy duty — Whether includes succession duty 76
See WILL. 2.

REVERSION—Crown reversion on estate in tail male—Large number of male issue living—Sale under Land Purchase Acts—Distribution of purchase-money without regard to Crown reversion - 96, 101
See LAND PURCHASE ACTS. 4.

ROMAN CATHOLIC RELIEF ACT, 1829—Monastic order - - - 76, 305
See CHARITY. 2, 3.

ROYAL ARMS—*Unauthorized user in connection with business—Injunction—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *s.* 68.] By sect. 68 of the Trade Marks Act, 1905, if any person without the authority of His Majesty uses in connection with any business the Royal Arms in such manner as to be calculated to lead to the belief that he is duly authorized so to use them, or if any person without the authority of His Majesty, or of a member of the Royal Family, uses in connection with any business any title in such a manner as to be calculated to lead to the belief that he is employed by or supplies goods to His Majesty or such members of the Royal Family, he may, at the suit of any person who is authorized to use such arms or title, or is authorized by the Lord Chamberlain to take proceedings in that behalf, be restrained by injunction from continuing so to use the same. The defendant had for a number of years carried on business as a victualler in Dublin, and conspicuously used on his business stationery, billheads, and delivery carts, and in advertisements, the Royal Arms, with the words "By appointment." The defendant had no authority to use the Royal Arms. His predecessor in the business, from whom he had purchased it, had been granted in 1839, by the then Lord Lieutenant of Ireland, a warrant

ROYAL ARMS—*continued.*
to use the Vice-regal Arms, and this warrant had been handed to, and was in the possession of, the defendant. He had supplied meat to the late King Edward when he visited Ireland. The defendant had used the Royal Arms in connection with his business for a number of years without interference, and had acted under the bona fide belief that he was entitled so to use them. He refused to discontinue such user, although called on so to do by the plaintiffs before action brought. The plaintiffs, who were an incorporated association authorized to use the Royal Arms, and who were specially authorized by the Lord Chamberlain to bring the present proceedings, having applied for an injunction to restrain the defendant from continuing to use the Royal Arms in such manner as to be calculated to lead to the belief that he was duly authorized to use them, and from using the title "By appointment," without the authority of His Majesty or of a member of the Royal Family, in connection with his business in such manner as to be calculated to lead to the belief that he was employed by or supplied goods to His Majesty or such member of the Royal Family: *Held*, that the defendant was using the Royal Arms without the requisite authority, and that the plaintiffs were entitled to such injunction, with costs. *Royal Warrant Holders Association* v. *Sullivan* - - - BARTON, J., 236

RULES AND ORDERS—Rules of the Supreme Court (1905)—Order XXVIII, Rule 11 - 73
See PRACTICE. 1.

—— —— Order XLII, Rule 7 - - 30, 32
See PRACTICE. 2.

—— Land Commission Rules, 16th March, 1897, Order XLVI, Rule 1 - 248
See LAND PURCHASE ACTS. 2.

—— Land Commission Rules of the 2nd July, 1910, Order VIII, Rule 4 - 302
See LAND PURCHASE ACTS. 6.

RURAL DISTRICT COUNCIL.
See Cases under LOCAL GOVERNMENT.

SALE— Executed contract—Rescission—Innocent misrepresentation - - 378.
See CONTRACT.

—— Power of
See POWER OF SALE.

SATISFACTION—Legacy to servant—Wages due - - - - - - 76
See WILL. 2.

SEPARATE USE—Devise to married woman—Property not to be sold or mortgaged—Life estate with restraint on anticipation
See WILL. 4. [111

SERVANT—Legacy to—Wages due—Satisfaction - - - - - - 76
See WILL. 2.

SERVANTS OF CROWN—Commissioners of Public Works—Loan to occupier of land—Crown debt—Statute of Limitations
See LIMITATIONS, STATUTE OF. [124

SETTLED LAND ACTS—Sale of settled lands under Land Purchase Acts—English Public Trustee sole trustee of settlement—Payment of purchase-money to him 5
See LAND PURCHASE ACTS. 7.

SETTLEMENT — *Construction — Covenant to settle after-acquired property—Gift from husband to wife.*] There is no general rule that a covenant in a marriage settlement to settle after-acquired property cannot capture gifts from the husband to the wife. *In re Ellis's Settlement*, [1909] 1 Ch. 618), and *In re Plumptre's Settlement*, [1910] 1 Ch. 609, followed. *Kingan* v. *Matier*, [1905] 1 I. R. 472, not followed. A marriage settlement made in 1865 contained covenants by the husband and wife separately to settle any sum or sums, stocks, or other personal estate, exceeding in amount or value £200 at any one time which should during the coverture "be given or bequeathed to, or in any manner vest in," the wife. In 1897 the husband, in consideration of natural love and affection, assigned absolutely to the wife a policy of insurance on his life for £6000 (with bonuses), and two mortgages for £500 and £600, respectively. *Held*, that these were captured by the covenant to settle. *Leigh-White* v. *Ruttledge*
BARTON, J., 135

2. —— *Construction — Portions — Vesting — Younger children—"Child or children other than or besides the first or only son or any other son or sons who before his or their attaining the age of twenty-one years shall become entitled" to the first estate tail—Amounts of portions variable according to the number of younger children—Younger son becoming eldest after attaining twenty-one—Right to share in portions fund.*] By a marriage settlement made in 1860 certain lands were limited to trustees for a term of 1000 years upon trust to raise portions for the children of the marriage. "other than or besides the first or only son or any other son or sons who before his or their attaining the age of twenty-one years shall become entitled under or by virtue of these presents to the same premises for the first estate in tail male," if there should be one such child, the sum of £4000, if there should be two such children, the sum of £6000, and if there should be three or more such children, the sum of £8000, and subject thereto the lands were limited to the use of the husband for life with remainder to his first and other sons in tail male. There were four children of the

SETTLEMENT—*continued.*
marriage. *M. W. B.*, the first-born son, attained twenty-one in his father's lifetime, and died without having disentailed, and thereupon *E. B.*, the second son, joined in barring the entail and resettling the lands, and on his father's death became entitled to the settled estates as tenant for life. Another child died under twenty-one and unmarried. *Held*, that, according to the true construction of the settlement, the sum of £8000 was raisable for portions for younger children, and that *E. B.* was a younger son for the purpose of participating therein, and was entitled to be paid the sum of £4000 by the trustees. *In re Beresford's Settlement*; *Irvine* v. *Beresford*
[M. R., 222

—— English settlement — Lands in Ireland — Appointment of English public trustee as sole trustee—Payment out of trust funds
See LAND PURCHASE ACTS. 7. [5

SIDESMEN—Election of—Proprietary Church
See ECCLESIASTICAL LAW. [321, 344

SPECIAL DAMAGE—Improvement scheme under Labourers (Ireland) Acts—Action by agricultural labourer not given preference in letting of cottage—Joinder of Attorney-General - - - 16
See LOCAL GOVERNMENT. 2.

SPECIAL DEFENDANTS — Action against public body—Costs - - - 16
See LOCAL GOVERNMENT. 2.

STATUTE—Construction—Statutory remedy not exclusive remedy - - - - 43
See MOUNTJOY SQUARE ACT.

—— Statutory duty — Action for breach of — Labourers (Ireland) Acts—Preferential right to cottage - 16, 113, 118, [201, 208
See LOCAL GOVERNMENT, 2, 3, 4.

STATUTES—
42 Geo. 3, c. XXXIV—Mountjoy Square 43
See MOUNTJOY SQUARE ACT.
10 Geo. 4, c. 7 — Roman Catholic Relief — Monastic orders - - 76, 305
See CHARITY. 2, 3.
6 & 7 Wm. 4, c. 31—Church Building
See ECCLESIASTICAL LAW. [321, 344
7 Wm. 4 & 1 Vict. c. 26, s. 28—Wills 86
See WILL. 3.
3 & 4 Vict. c. 101—Church Building 321, 344
See ECCLESIASTICAL LAW.
7 & 8 Vict. c. 45, s. 2—Dissenters' chapels
See CHARITY. 4. [271
10 & 11 Vict. c. 32—Landed Property Improvement, Ireland - - - - 124
See LIMITATIONS, STATUTE OF.

STATUTES—*continued.*

12 & 13 Vict. c. 99—Church building 321, 344.
See Ecclesiastical Law.

14 & 15 Vict. c. 72—Church Building 321, 344
See Ecclesiastical Law.

16 & 17 Vict. c. 113, s. 20—Limitation of Actions - - - - - - 188
See Mortgage. 1.

32 & 33 Vict. c. 42, ss. 12, 19, 20, 70—Irish Church - - - - - 321, 344
See Ecclesiastical Law.

33 & 34 Vict. c. 35—Apportionment - 81
See Will. 1.

37 & 38 Vict. c. 57, s. 7—Limitations - 23
See Mortgage. 5.

44 & 45 Vict. c. 49, s. 31, sub-s. 2—Land Law - - - - - - - 124
See Limitations, Statute of.

—— —— s. 50 - - - - - 248
See Land Purchase Acts. 2.

46 & 47 Vict. c. 60. s. 13—Labourers - 16
See Local Government. 2.

50 & 51 Vict. c. 33, s. 15. sub-s. 3—Land Law - - - - - - - 302
See Land Purchase Acts. 6.

53 & 54 Vict. c. 70, Sch. II, Art. 24—Housing of Working Classes - - - 297
See Local Government. 1.

54 & 55 Vict. c. 48, s. 5, sub-s. 2—Purchase of Land - - - - - - 175
See Executor.

—— c. 66, ss. 92, 93 (Local Registration of Title).
See Local Government. 5. [65

59 & 60 Vict. c. 47, s. 31, sub-s. 5—Land Law - - - - - - 96, 101
See Land Purchase Acts. 4.

—— —— s. 37, sub-s. 1- - - - 302
See Land Purchase Acts. 6.

61 & 62 Vict. c. 37, s. 51, sub-s. 7—Local Government—Limitation of Time 297
See Local Government. 1.

63 & 64 Vict. c. 58, ss. 2, 3—Tithe Rentcharge - - - - - - 1
See Land Purchase Acts. 5.

—— —— s. 9 - - - - - - 302
See Land Purchase Acts. 6.

3 Edw. 7, c. 37, s. 1—Irish Land - 290
See Land Purchase Acts. 1.

—— —— s. 12, sub-s. 1 - - - 175
See Executor.

—— —— s. 15 - - - - - 290
See Land Purchase Acts. 1.

—— —— s. 43 - - - - - 175
See Executor.

STATUTES—*continued.*

3 Edw. 7, c. 37, s. 64 - - - - - 302
See Land Purchase Acts. 6.

—— —— s. 98, sub-s. 2 - - - 96, 101
See Land Purchase Acts. 4.

5 Edw. 7, c. 15, s. 68—Trade Marks - 236
See Royal Arms.

6 Edw. 7, c. 37, s. 11, sub-ss. 1, 4, 6, s. 21—Labourers - - - - - 65
See Local Government. 5.

—— —— s. 29 - - 16, 113, 118, 201, 208
See Local Government. 2, 3, 4.

—— c. 55, s. 5, sub-s. 1—Public Trustee 5
See Land Purchase Acts. 7.

7 Edw. 7, c. 86, s. 2, sub-s. 4—Evicted Tenants - - - - - - 364
See Land Purchase Acts. 3.

9 Edw. 7, c. 42, Part iv—Irish Land 248
See Land Purchase Acts. 2.

—— —— s. 28, sub-s. 1 - - - 175
See Executor.

STREET AUTHORITY—Consent to erection of telephone posts and wires - 9
See Telegraph Acts.

SUCCESSION DUTY—Direction to pay legacy duty — Whether includes succession duty - - - - - - 76
See Will. 2.

SUPERIOR INTEREST—Redemption—Compulsory purchase—Costs - - 248
See Land Purchase Acts. 2.

—— Redemption—Crown reversion on estate in tail male—Large number of male issue living—Distribution of purchase-money without regard to Crown reversion
See Land Purchase Acts. 4. [96, 101

—— Redemption—Tithe rentcharge.
See under Tithe Rentcharge.

TELEGRAPH ACTS—*Erecting telegraph-posts and wires — "Garden"—"Pleasure-Ground"—Consent of street authority given subsequent to erection — Pole erected within ten yards of dwelling-house in a town—Telegraph Act*, 1863 (26 & 27 *Vict.* c. 112), *ss.* 21, 22.] Section 21 of the Telegraph Act, 1863, permits a telegraph company, within the limits of a town having a certain population, and with the consent of the street authority, to place and maintain a telegraph across any land not being laid out as building land, or not being a garden or pleasure-ground, provided that twenty-one days' previous notice is published by the company stating that they have obtained such consent, and describing the intended course of such telegraph. *Held*, that a pleasure-ground, to come within the meaning of the section, should have

TELEGRAPH ACTS—*continued.*
some equipment of a more or less permanent character that would be of service to persons frequenting it for the purpose of recreation, and that a yard used by the plaintiff mainly for the purpose of his business, and without such equipment, but in which his children were in the habit of playing, was not such a "pleasure-ground." *Held*, also, that the exception in the section is only made in respect of *land* which is not a pleasure-ground or garden, and not in respect of buildings, and that a garden on the roof of a building was not within the exception. *Held*, also, that the consent of the street authority must be obtained before the erection of the telegraph, and that a subsequent consent is not sufficient. Section 22 of the same Act, which prohibits a telegraph company from placing a telegraph-post within ten yards of a dwelling-house, except as therein provided, applies only to rural districts, or to cases where telegraph-posts are put up on property of one person with his consent, but at a distance of less than ten yards from the house of another person. *Stevens* v. *National Telephone Company, Limited. Edward Lee & Co., Limited* v. *The Same* - - - - - - Ross, J., 9

TELEPHONE—Erecting posts and wires 9
See TELEGRAPH ACTS.

TITHE RENTCHARGE — Impropriate — Redemption price—Percentage of variation
See LAND PURCHASE ACTS. 5. [1

—— Payable to Land Commission—Redemption price—Tithe rentcharge subject to lease of which only short term unexpired 302
See LAND PURCHASE ACTS 6.

TITLE—Covenants for
See under COVENANT.

TRADE MARK—Royal Arms—Unauthorized user—Injunction - - - 236
See ROYAL ARMS.

TRANSFER—Mortgage—Priority - 123
See MORTGAGE. 4.

TRUST—Charitable.
See under CHARITY.

—— Constructive—Person entering on lands of lunatic—New letting—Graft - 53
See LUNATIC.

—— Public — Action to restrain breach of—Necessity to join Attorney-General . 16
See LOCAL GOVERNMENT. 2.

—— Resulting—Dissolution of Benefit Society—Unexpended funds - - - 142
See BENEFIT SOCIETY.

— Resulting—Presumption of advancement—Husband and wife—Husband's money on deposit receipt in names of husband, wife, and third party - - - 89
See HUSBAND AND WIFE.

TRUSTEE—Land Purchase Acts—Payment to English public trustee - - 5
See LAND PURCHASE ACTS. 7.

UNITARIANS—Whether included in term "Dissenting Protestants" — Religious doctrines—Usage for twenty-five years
See CHARITY. 4. [271

VESTING—Portions—Younger son becoming entitled to estate—Right to share in portion fund - - - - 222
See SETTLEMENT. 2.

WAIVER—Covenant to build—Not enforced for many years - - - - 35
See LAND LAW (IRELAND) ACTS.

WELSH MORTGAGE—Power of sale—Statute of Limitations - - - - 23
See MORTGAGE. 5.

WILL—*Construction—Bequest of debts due at testator's death—Dividends declared after testator's death—Portion accrued during his lifetime—Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35)] A testator bequeathed "all the debts and accounts due to me at the time of my death, except rents issuing out of houses and lands" to *T. Held*, that the bequest did not include the apportioned part, accrued during testator's lifetime, of dividends declared after his death in respect of the half-year in the course of which he died. *In re Burke*; *Wood* v. *Taylor* - - - BARTON, J., 81

2. —— *Construction—Charity—Gift to Monastic Order—Void bequest*—10 *Geo.* 4, *c.* 7—*Gift to servant—Satisfaction of debt by legacy*—"*Legatee.*" *Whether devisee of real estate included—Bequest of residue "to the several legatees other than charitable legatees hereinbefore named" — Non-charitable legacy given by subsequent clause in will—Right of such legatee to share in residue—Legacies given free of legacy duty—Whether covers succession duty.*]
Bequest "to the Superior for the time being of the Cistercian monastery, Mount Melleray, the sum of £1000 for the use and benefit of said monastery, and the works of charity carried on by said Order": *held* void, as being a gift to an illegal community.
Bequest to a servant held to be a satisfaction of wages due to him by the testator at the time of his death.
Bequest of the residue "to the several legatees other than charitable legatees hereinbefore named,"
Held, that "legatees" meant persons to whom a bequest of personalty was made, and did not include a devisee of a freehold farm.
Held also that a legatee to whom a non-charitable legacy was given by a subsequent clause in the will was entitled to a share in the residue.

WILL—*continued.*

After giving certain pecuniary legacies, the testator devised a freehold farm to *F.* and directed "all said legacies to be paid free of legacy duty." *Held*, not to apply to the devise of the farm so as to cover succession duty. *Ellard* v. *Phelan* [Ross, J., 76

3.——*Construction—Devise, whether in fee or for life—Devise of portion of freehold farm to A without words of limitation, and subject to a rent—Devise of whole farm to B and C, subject to tenancy bequeathed to A—Wills Act* (1 *Vict. c.* 26), *s.* 28—*Contrary intention.*] A testator by his will, executed in 1908, bequeathed to *P. G.* "the field (with his house thereon) containing about 11 Irish acres, subject to a rent of £1 per Irish acre to be paid to my nephews, *N. M.* and *J. M.*" The field formed part of the farm of *M.*, which was held by the testator in fee-simple, and was devised to *N. M.* and *J. M.* in these words: "I leave, devise, and bequeath to my two nephews, *N. M.* and *J. M.*, my house and farm at *M.* (subject to the tenancy hereinbefore bequeathed to *P. G.*)." *Held*, that the description in the will of *P. G.*'s interest as a "tenancy," coupled with the fact of a rent being payable by him to *N. M.* and *J. M.*, afforded such evidence of a contrary intention as prevented sect. 28 of the Wills Act from applying, and that *P. G.* took only an estate for life in the field. *In re Gannon*; *Spence* v. *Martin* M.R., 86

4.——*Construction—Devise—Property neither to be mortgaged nor sold—Life interest—Married woman—Restraint on anticipation.*] A testator by his will devised certain houses, held under a lease for lives renewable for ever, to *M.* for her sole use, neither to be mortgaged nor sold, and at her demise to descend to her next-of-kin, and neither to be mortgaged nor sold as long as the lease of the said houses should last. *Held*, that *M.* took only a life interest for her separate use, with a restraint on anticipation during coverture. *In re Taylor Shaw* v. *Shaw* - BARTON, J., 111

5.——*Construction—Several documents together constituting will—Legacies, whether cumulative or substitutional.*] A testatrix by her will bequeathed seven legacies to as many legatees, including two legacies to her two executors in case they acted as such; she bequeathed a sum of stock to her executors on trust to pay the income to *A* for life, then to *B* for life, and directed that on the death of the survivor the said stock should fall into her residuary estate, which she devised and bequeathed to two persons in equal shares. The testatrix subsequently executed four documents in the nature of codicils; and seven months after the date of the first will executed a second, beginning

WILL—*continued.*

with the words, "This is my last will and testament," but containing no revocation clause. The second will was almost a copy of the first; the legatees were the same, and were mentioned in the same order. Four of the pecuniary legacies were, however, reduced in amount; one was increased; and two remained unaltered. The bequest of stock was repeated, and the same persons were appointed residuary legatees. All six testamentary documents were together admitted to probate. *Held*, by the Court of Appeal (reversing the decision of Barton, J.), that the pecuniary legacies bequeathed by the second document were substitutionary for those in the first, and not cumulative. *Bell* v. *Park* - - - - APP., 158

—— Charitable bequest—Bequest to College for education of testator's relations — Preference to be given to most eligible and best conducted—Right of selection—Duty of College - - - - 194
See CHARITY. 1.

—— Charitable bequest — Bequest to Monastic Order—Validity of - - 76, 305
See CHARITY. 2, 3.

WINDING UP—
See under COMPANY.

WORDS—"As Beneficial Owner" 180, 285
See MORTGAGE, 2, 3.

—— "Congregation" - - - - - 271
See CHARITY. 4.

—— "Contrary intention"—Wills Act, s. 28.
See WILL. 3. [86

—— "Debt, claim, or demand which is directly or indirectly payable out of the poor rate
See LOCAL GOVERNMENT. 1. [297

—— "Dissenting Protestants" - - 271
See CHARITY. 4.

—— "Garden" - - - - - 9
See TELEGRAPH ACTS.

—— "Legatees" - - - - - 76
See WILL. 2.

—— "Pleasure ground" - - - 9
See TELEGRAPH ACTS.

—— "Subject-matter of suit" - - 60
See COUNTY COURT.

WORDS OF LIMITATION—Absence of—Devise—Wills Act, s. 28—Contrary intention - - - - - 8
See WILL. 3.

YOUNGER CHILDREN—Portions—Vesting—Younger son becoming entitled to estate—Right to share in portion fund
See SETTLEMENT. 2. [222

THE END.

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